82 - 1651

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CRISPUS NIX, Warden of the Iowa State Penitentiary,
Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals exceeded its authority in reaching out to an issue not presented to or litigated in the state or federal trial courts in order to reverse a denial of habeas corpus by the District Court?

2. Whether the Court of Appeals violated the dispositional rule in *Jackson* v. *Denno,* 378 U.S. 368 (1964), by mandating a third new trial rather than remanding the case for a limited proceeding where reversal was based on an issue of constitutional fact which arose only on appeal and on which the State has not had a fair opportunity to present evidence?

3. Whether the Court of Appeals correctly concluded, on the record before it, that the State could not show lack of bad faith on the part of police, when, as the Iowa Supreme Court unanimously observed, "the propriety of police conduct ... has caused the closest possible division in every appellate court which has considered the question.... ?" *State* v. *Williams,* 285 N.W.2d 248, 260 (Iowa 1979) (A. 45)

4. Whether the inevitable discovery exception to the exclusionary rule requires the State to show lack of subjective bad faith on the part of police officers?

5. Whether the rule in *Stone* v. *Powell,* 428 U.S. 465 (1977) should be extended to a Sixth Amendment case where highly probative and reliable physical evidence is challenged in a habeas proceeding after a full and fair opportunity to raise the issue on direct review in state courts?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Crispus Nix, Warden of the Iowa State Penitentiary, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals granting respondent herein a writ of habeas corpus on January 10, 1983 (rehearing denied and suggestion for rehearing en banc denied by an equally divided court, March 15, 1983).

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, and the orders denying rehearing and rehearing en banc, also not reported, appear in the Appendix hereto. The unreported opinion of the United States District Court for the Southern District of Iowa, *Williams* v. *Nix,* Civ. No. 80-450-D (S.D. Iowa Dec. 18, 1981), and the opinion of the Iowa Supreme Court, *State* v. *Williams,* 285 N.W.2d 248 (Iowa 1979) also appear in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on January 10, 1983. Timely petitions for rehearing and rehearing en banc were denied on March 15, 1983, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Amendment Six

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

United States Code, Title 28

Section 2254

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

This Court is already familiar with the tragic character of this 15 year old proceeding since it has been here before on certiorari. *See Brewer* v. *Williams,* 430 U.S. 387 (1977). A brief review of the underlying facts and legal posture of the case demonstrates the urgent need for authoritative review by this Court.

On Christmas Eve, 1968, ten year old Pamela Powers disappeared from the Des Moines YMCA where she had been watching a wrestling match with her family. Suspicion focused on

Williams, an escaped mental patient residing at the YMCA, who was seen leaving the building with a large bundle wrapped in a blanket. A boy who helped Williams open his car door testified that he viewed the bundle and "saw two legs in it and they were skinny and white." 430 U.S. at 390.

Law enforcement officials began a massive search to find Williams who eventually surrendered to police in Davenport, Iowa, some 160 miles from Des Moines. While transporting Williams back to Des Moines from Davenport, Detective Cletus Leaming obtained information from Williams about the whereabouts of the girl's body. Following Williams' directions, the police uncovered the body of Pamela Powers. Medical examination of the corpse revealed presence of acid phosphatase, a component of semen, in her body, as well as pubic hairs on the victim's clothing "like" those of Williams. *See Williams* v. *Nix,* No. 82-1140, slip. op. at 8 (8th Cir. Jan. 10, 1983) (Appendix 7-8, hereinafter "A").

Williams was tried and convicted of first degree murder. At trial, the State introduced the articles of clothing, evidence relating to the body's discovery and condition, and incriminating statements made to Detective Leaming by the defendant. 430 U.S. at 394. The conviction was affirmed in a five to four decision by the Iowa Supreme Court, *State* v. *Williams,* 182 N.W.2d 396 (Iowa 1970). On collateral review, however, the United States District Court for the Southern District of Iowa sustained Williams' petition for a writ of habeas corpus, *Williams* v. *Brewer,* 375 F.Supp. 170 (S.D. Iowa 1974) and a divided panel of the United States Court of Appeals for the Eighth Circuit affirmed. 509 F.2d 227 (8th Cir. 1974)

This Court, in a 5-4 decision, affirmed the grant of the writ. *Brewer* v. *Williams,* 430 U.S. 387 (1977). The majority found that an agreement had been made between Williams' attorney and unnamed Des Moines police officers that the defendant would not be interrogated on his way back to Des Moines. 430

U.S. at 391. The Court further found that Detective Leaming, while avoiding directly questioning Williams, did nevertheless attempt to elicit information from him by making statements about the victim's need for a decent Christian burial. 430 U.S. at 399. The majority found Leaming's action violated the defendant's right to counsel guaranteed by the Sixth and Fourteenth Amendments and held that introduction of evidence discovered as a result of the interrogation was erroneous and required reversal. 430 U.S. at 406.

In an important footnote, however, the Court majority noted that while communicative evidence from the defendant could not be constitutionally admitted under any circumstance, the physical evidence, the body and its condition:

> might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams. (citation omitted) . . . . In the event that a retrial is instituted, it will be for the state courts in the first instance to determine whether particular items of evidence may be admitted.

430 U.S. at 441, n.12.

The State retried Williams and sought to introduce evidence about the body under the "inevitable discovery" exception to the exclusionary rule alluded to in the above footnote. A suppression hearing was held in state court at which the defense contested the prosecution's claim that the body "would have been discovered in any event." 430 U.S. at 441, n.12. The state trial court heard testimony regarding the law enforcement search efforts in the area where the body was eventually found. The trial court, held that the body would have been discovered anyway and denied Williams' motion to suppress. *See State* v. *Williams,* 285 N.W.2d 248, 260-62 (1979) (A.46-8).

With testimony about the body and its condition admitted, Williams was again convicted of first degree murder. The Iowa

Supreme Court sua sponte raised the question of whether the State must show that police did not act in bad faith for the purpose of hastening discovery of the body before it could constitutionally invoke the inevitable discovery exception. *State* v. *Williams*, 285 N.W.2d 248, 260 (Iowa 1979) (A.40-1). The Iowa Court found such a requirement, but unanimously held that on the record the State had plainly satisifed the test. The Court stated:

> The issue of the propriety of the police conduct in this case, as noted earlier in this opinion, has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.

State v. *Williams*, 285 N.W.2d 248, 260 (Iowa 1979) (A.45).

Williams then launched another assault on his conviction in federal district court. He raised seven other questions not now before the Court. With respect to the application of the inevitable discovery exception, Williams limited his challenge to reargument of the defense position before the state trial court, namely, that the body would not, in fact, have been "inevitably discovered" because of the lack of thoroughness in the police search and the difficulty in observing a snow covered body.

The District Court denied the writ, holding, *inter alia*, that the inevitable discovery exception existed and was properly invoked. *Williams* v. *Nix*, Civ.No. 80-450-D slip. op. at 6-11 (S.D.Iowa Dec. 18, 1981) (A.75-80) The District Court opinion contained no mention of the nonlitigated, lack-of-bad- faith issue. On appeal, the Court of Appeals for the Eighth Circuit reversed. A three-judge panel held that "the State did not satisfy its burden of proving by a preponderance of evidence that the police did not act in bad faith in obtaining Williams'

statements that led them to the body." *Williams* v. *Nix,* No. 82-1140, slip. op. at 18 (8th Cir. Jan. 10, 1983) (A.17).

The State then sought rehearing both before the original panel and en banc. On March 15, the original panel denied rehearing. In a four page opinion, the court, while noting "concessions" made by the state in oral argument, also held that admission of the challenged physical evidence "would impermissibly reduce the deterrent effect of the exclusionary rule." *Williams* v. *Nix,* slip. op. at 2 (Mar. 15, 1983) (reh'g denied) (A.23).

On the same day, the Court of Appeals denied rehearing en banc by a 4-4 vote. Judge Fagg joined by Judges Bright and Ross, filed a dissenting opinion noting that the lack of bad faith issue "has not been placed in issue or litigated in the state and federal trial courts." *Williams* v. *Nix,* slip. op. at 1 (Mar. 15, 1982) (reh'g en banc denied) (A.20). He noted that the State and the defense both viewed the inevitable discovery exception at trial as having "only *one* prong, inevitable discovery of the body, and that was the issue presented to the trial judge." *Id.* at 2 (emphasis in original) (A.20). Only later did the Iowa Supreme Court inject the second prong, good faith, into the case. Rather than remand the case "to the trial court for a limited evidentiary hearing," the Iowa Supreme Court "ruled as a matter of law that Officer Leaming acted in good faith." *Id.* at 3 (A.21). The dissent thus argued, at a minimum, that some kind of limited remand should be considered. *Id.*

The Court, on its own motion, stayed the order and issuance of the mandate for thirty days from the date of filing to allow the State to seek a writ of certiorari. The Court further ordered that the stay would continue until final disposition by this Court.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises Serious Questions About The Appropriate Role Of A Federal Appellate Court Reviewing Collateral Attacks On State Court Judgments.

This Court has recently given clear direction that lower federal courts exercise extreme caution in overturning state court convictions. *Engle* v. *Issac*, ____ U.S. ____, 102 S.Ct. 1558 (1982); *Rose* v. *Lundy*, ____ U.S. ____, 102 S.Ct. 1198 (1982); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Stone* v. *Powell*, 428 U.S. 465 (1977). Yet in this case the Court of Appeals not only overturned a conviction on an issue not raised in the trial courts, but refused to allow the State an opportunity on remand to show it could meet a new, unanticipated constitutional requirement discovered for the first time by the appellate courts after trial.

At Williams' second trial, the State attempted to free testimony about the body and its condition from the taint of interrogation found to be illegal in *Brewer* v. *Williams* by showing that the evidence would have been discovered independent of any illegality. *See* 430 U.S. 387, 406 n.12 (1977). In its suggestion of the inevitable discovery rule, this Court said nothing about lack of bad faith on the part of the police officers, nor did the case cited by the court as an example of the rule. *Killough* v. *United States*, 336 F.2d 959 (D.C. Cir. 1964). Consequently, no proof of a lack of bad faith was made or attempted by the prosecution in the state court suppression hearing. The defense did not challenge the absence of proof of lack of bad faith. The issue on which the Court of Appeals reversed the District Court, namely, the failure of the State to show lack of bad faith on the part of Detective Leaming, thus was not litigated in the state trial court.

On review, the Iowa Supreme Court embraced an inevitable discovery rule which required the State to show lack of bad faith by police officers. While Williams had not raised the issue in his

brief or at oral argument, the Iowa Supreme Court sua sponte accepted as proof of lack of bad faith the uncertain state of the law as applied to the police officer's conduct in question. *State* v. *Williams*, 285 N.W.2d 248, 260 (1979) (A.45).

In his habeas corpus action in United States District Court, Williams did not, in the pleadings or in the more than 90 pages of briefs and arguments, ever once directly or indirectly challenge or even refer disparagingly to the Iowa Supreme Court's findings or conclusion on the lack of bad faith issue. The subject was not mentioned in oral argument before the District Court. Not until his brief in the Court of Appeals, in three conclusory lines and perfunctory footnote, did Williams make *any* mention of a challenge to the Iowa Supreme Court's lack of bad faith conclusion.

The State thus had no real notice that the lack of bad faith was actually being challenged. Williams had not in any substantial way briefed the issue, nor had the State. Counsel for both parties focused their arguments on a series of other issues not now before the court. The issue was not raised by Williams' counsel in oral argument until questioned from the bench.

The lack of bad faith question simply was not properly presented to the Court of Appeals notwithstanding the discussion at oral argument. As this Court has stated earlier in this prolonged litigation, in considering whether *Stone* v. *Powell*, 430 U.S. 387 (1977), applied to challenges to Williams' first conviction:

> The *Stone* issue was not mentioned in any of the briefs, including petitioners' reply brief filed September 29, 1976 - some three months after our decision in *Stone* was announced. The possible relevance of Stone was raised by a question from the bench during oral argument. This prompted brief comments by counsel for both parties (citations omitted). ***But in no meaningful sense can the issue be viewed as having been 'argued' in this case.***

430 U.S. 387, 414 n.3 (Justice Powell concurring) (emphasis supplied).

The general rule is that an issue not raised in District Court is not considered when raised on appeal. *Singleton* v. *Wulff*, 428 U.S. 106 (1976). This rule is generally enforced in habeas corpus cases. *Holiday* v. *Wyrick*, 663 F.2d 789 (8th Cir. 1981), *Zaehringer* v. *Brewer*, 635 F.2d 734 (8th Cir. 1980). The State believes whether an issue not litigated below and not fully presented on appeal is within the grasp of a federal appellate court reviewing denial of habeas corpus is a serious question worthy of authoritative review.

The panel opinion of the Court of Appeals denying rehearing noted that "the State's brief did not argue that it had never had a chance to prove good faith. Nor did it argue [on appeal] that the issue had not been raised in the District Court." *Williams* v. *Nix*, slip. op. at 4 (8th Cir. Mar. 15, 1983) (reh'g denied) (A.26). The Court of Appeals panel thus declared that the State was foreclosed from raising a new argument on rehearing, even though the defendant Williams was allowed to prevail on a new argument on appeal not presented below. The Court of Appeals made extraordinary allowances for the defendant, but did not afford similar treatment to the State. Regardless of the ultimate outcome of this case, this procedural double standard does not properly balance the competing demands of fairness to the defendant with the needs of the criminal justice system in the adversarial process and should not be allowed to stand as precedent in the Circuit.

Moreover, by refusing to remand the case for a limited evidentiary hearing, the Court of Appeals not only decided the case without a record, but also assumed what the record would show if the issue had been litigated below. After surveying previous opinions in this case, the Court of Appeals declared with apparent confidence that Detective Leaming's activities were "not the actions of a man who believed he was doing the

right thing, only to be confounded later on a close vote on a question of law." *Williams* v. *Nix, supra,* slip. op. at 18 (8th Cir. Mar. 15, 1983) (reh'g denied) (A.17).

But such a sweeping conclusion by an appellate court reviewing a state court conviction is unfounded where the State has not been afforded an opportunity to make a record in an evidentiary proceeding on a newly injected constitutional issue. It is surely not inconceivable that the State could meet its burden if given an opportunity. In this case, *Miranda* warnings were given no less than five times to the accused. *See Brewer* v. *Williams,* 430 U.S. at 415 (Burger, C.J., dissenting). And, it seems obvious that Detective Leaming himself was trying to honor what he thought was the key legal requirement of *Miranda,* namely, *noninterrogation.* As he told Williams after talking to him in the car, "I do not want you to answer me. I do not want to discuss it further." *See* 430 U.S. at 393. While Leaming may later have been judged by a narrow majority in the Supreme Court of the United States to have crossed the constitutional line, findings in the case on other issues demonstrates at least some police sensitivity to Williams' constitutional rights.

Given the absence of appropriate proceedings below, the panel's order reversing Williams' second conviction is contrary to consistent holdings of this Court. In *Jackson* v. *Denno,* 378 U.S. 368 (1964), this Court held that procedures used by New York to determine the voluntariness of a confession did not comport with due process. But the Court did not reverse the conviction. As the Court observed:

> We cannot assume that New York will not now afford Jackson a hearing that is consistent with the requirements of due process. Indeed, New York thought it was affording Jackson such a hearing, and not without support in the decisions of this Court . . .

378 U.S. at 395.

Similarly, in *United States* v. *Wade,* 388 U.S. 218 (1967), this Court found a violation of the right to counsel at a lineup. The Court, however, reversed the Court of Appeals order for a new trial, ordering the case back to the trial court for a hearing on whether there was an independent basis for an in-court identification. 388 U.S. at 244. The Court noted that "whether [the] in-court identification had an independent origin . . . was not an issue at trial, although there is some evidence relevant to a determination." 388 U.S. at 242. The initial determination on the question, the Court held, was best made at trial court. *Id.*

If resolution of the lack of bad faith issue is necessary for disposition of the case, a substantial argument can be made that the cause should be remanded either to federal district court or to state court for appropriate evidentiary proceedings. The State urges this Court to review the question to reinforce the now seriously eroded authority of *Jackson* and *Wade,* to provide supervision to the lower federal courts, and to promote efficiency in the criminal justice system.

2. Review By This Court Is Required To Resolve A Conflict Among The Courts Of Appeals As To Whether The Inevitable Discovery Exception To The Exclusionary Rule Requires The State To Show Lack Of Bad Faith On The Part Of Police Officers Before It May Be Invoked.

The Court of Appeals, conceding *arguendo* that an inevitable discovery exception exists, held that the State had not made a sufficient showing of lack of subjective bad faith on the part of Detective Leaming in order to invoke the exception. *See Williams* v. *Nix,* slip. op. 13-14 (8th Cir. Mar. 15, 1983) (reh'g denied) (A.12). This Court, however, has never suggested that the State must prove lack of subjective bad faith before availing itself of the inevitable discovery exception. Indeed, the footnote in *Brewer* v. *Williams* is totally devoid of any discussion of a lack of bad faith requirement. And, the leading case relied on by the Court discusses only the need to show that the body

would have been discovered eventually notwithstanding the illegally-seized evidence. *Killough* v. *United States,* 336 F.2d 929 (D.C. Cir. 1964).

The holding of the Court of Appeals decision is not only contrary to *Killough* but also to decisions in the Third, Fifth and Ninth Circuits. In *United States* v. *Brookings,* 614 F.2d 1037 (5th 1980), the Court of Appeals for the Fifth Circuit did not require a showing of bad faith but "simply a reasonable probability that the evidence in question would have been discovered other than by the tainted source." 614 F.2d at 1042, n.2. Similarly, in *United States* v. *Schmidt,* 573 F.2d 1057 (9th Cir. 1978), the Court of Appeals for the Ninth Circuit holds that evidence which almost certainly would have been discovered is admissible without further inquiry. 573 F.2d 1065, n.9. And, in *Government of the Virgin Islands* v. *Gereau,* 502 F.2d 914 (3rd Cir. 1974), the Court of Appeals for the Third Circuit allowed introduction of a weapon where the state demonstrated "that police and FBI agents would have found the luger even without Smith's statement." 502 F.2d at 927. Resolution of the conflict between the Eighth and Third, Fifth, Ninth and D.C. Circuits on the elements required to invoke the inevitable discovery exception requires exercise of this Court's certiorari jurisdiction.

Even if the State must show lack of bad faith, however, there is no clear authority for the proposition that the inquiry is *subjective* in nature as assumed by the panel in this case. *Williams* v. *Nix,* slip. op. at 13 (8th Cir. Mar. 15, 1983) (reh'g denied). Probing into the depths of human motivation is always difficulty and in view of the State would be an unworkable approach to the inevitable discovery exception. *See* Kaplan, *Limits of the Exclusionary Rule,* 26 Stan. L. Rev. 1027, 1045, 1047 (1974). The State believes that if there is a lack of bad faith constitutional requirement, an *objective* approach to police conduct is far more desirable. *Cf. Harlow* v. *Fitzgerald,* ____ U.S. ____, 50 U.S.L.W. 4815 (BNA) (U.S. Jan. 24, 1982) (objective good faith for prosecutorial immunity). Under an objective test, the

question would be whether police officers could reasonably believe their actions were constitutionally permissible. As applied to the present case, where courts and the best legal minds have been closely divided, the answer, as the Iowa Supreme Court unanimously concluded in this case, is clearly yes. *State* v. *Williams,* 285 N.W.2d 248, 260 (Iowa 1979) (A.45).

The contours of a lack of bad faith requirement, if any, were not developed in this litigation for the reasons outlined above in Part 1. It is respectfully suggested that if the issue was appropriately raised in the appellate court, the question of what is required before the inevitable discovery exception is invoked is worthy of this Court's consideration.

3. The Decision Below Raises The Important Question Of Whether *Stone* v. *Powell* Should Be Extended To Sixth Amendment Cases Where Highly Probative And Reliable Physical Evidence Is Challenged In A Habeas Proceeding After A Full And Fair Opportunity To Raise The Issue On Direct Review In State Courts?

This case also squarely raises the applicability of the doctrine of *Stone* v. *Powell,* 428 U.S. 465 (1977), in a non-Fourth Amendment context. The Court of Appeals dismissed the argument, noting erroneously that this Court "necessarily rejected" extension of *Stone* in *Williams* v. *Brewer. Williams* v. *Nix, supra,* slip. op. at 12 n.8 (A.11). The question, however, was expressly left open when this case was previously before the Court. *Brewer* v. *Williams,* 430 U.S. at 414 (Powell, J., concurring). One other case is presently before the Court which raises the issue of extension of *Stone* to non-Fourth Amendment cases. *White* v. *Finkbeiner,* 687 F.2d 885 (7th Cir. 1982), *petition for cert. filed sub. nom. Fairman* v. *White,* 51 U.S.L.W. 3001 (BNA) (U.S. June 18, 1982) (No. 81-2340).

The entire rationale of *Stone* v. *Powell* applies with full force to this Sixth Amendment case involving highly probative and reliable physical evidence. Police will be adequately deterred by

the possibility of losing convictions on direct appeal. The marginal deterrence value of relitigating the issue on collateral attack is minimal. And the interest in promoting finality in criminal judgments will be promoted. *See* 428 U.S. at 492-4.

The reason *Stone* v. *Powell* has not been generally applied outside the Fouth Amendment is not because Fifth and Sixth Amendment violations should be categorically excluded from its reach because of some abstract reason or because the Fifth and Sixth Amendments are more highly placed in the constitutional hierarchy. Rather, Fifth and Sixth Amendment violations are generally not linked with highly reliable physical evidence that nearly universally characterizes Fourth Amendment search and seizure cases. The State believes the focus of the analysis in applying *Stone* should be on the nature of evidence gathered, not the type of constitutional violation which occurred.

The issue presented here is thus not whether *Stone* v. *Powell* applies to *all* cases where the right to counsel has been infringed. There may be occasions, for instance, where impairment of the right to counsel so undermines the fundamental fairness of the criminal proceeding that federal courts should not lightly relinquish their habeas jurisdiction. Rather, the issue is whether *Stone* v. *Powell* should be extended to non-Fourth Amendment claims were highly probative and reliable physical evidence has been obtained.

The case materially differs from those concerning the suppression of confessions allegedly obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), to which *Stone* v. *Powell* might also be extended. Unlike here where physical evidence is involved, introduction of communicative evidence obtained from the accused in violation of *Miranda* often affects the fairness and accuracy of the criminal process. And, also unlike this case, litigants in *Miranda* cases could simply transform their challenge from a comparatively narrow attack on whether *Miranda* strictures were followed into a more broadly based

assault on the voluntariness of their confession, thereby reopening the door of the federal courthouse. *White* v. *Finkbeiner, supra,* 687 F.2d at 892-3.

The case for extending *Stone* v. *Powell* in the present context is even more compelling since the state courts found that the challenged evidence would have been discovered anyway notwithstanding the alleged constitutional violation. Thus, not only has the highly probative evidence survived the gauntlet of direct review, but its admission has also been buttressed on a theory that frees it from the taint of underlying constitutional infraction.

Nothing in *Rose* v. *Mitchell,* 443 U.S. 545 (1978), is to the contrary. In this case, the Court refused to extend *Stone* v. *Powell* to claims of discrimination in the selection of a grand jury. In *Rose,* the Court doubted that a full and fair hearing of the claim would be available in state courts since the appointing trial court would initially decide the merits of the claim. 403 U.S. at 561. Further, the Court noted a constitutionally protected right was at stake, not a judicially created remedy. 403 U.S. at 562. Finally, the Court noted that, unlike in *Stone,* "the deterrent effect of federal review is likely to be great, since state officials . . . may be expected to take note of a federal court's determination that their procedures are unconstitutional and must be changed." 443 U.S. at 563. None of those distinguishing features are present in the case at bar.

Consideration of this modest extension of *Stone* v. *Powell* by the Court would be of substantial benefit to the federal judiciary. While the courts have generally declined to extend *Stone* v. *Powell* to non-fourth Amendment cases, considerable doubt can be found in the opinions. *See, e.g., White* v. *Finkbeiner,* 687 F.2d 885 (7th Cir. 1982), *petition for cert. filed sub. nom Fairman* v. *White,* ____ U.S. ____ 51 U.S.L.W. 3001 (BNA) (U.S. June 18, 1982) (No. 81-2340); *see Satchell* v. *Cardwell,* 653 F.2d 408, 409, n.6 (9th Cir. 1981), *Sallie* v. *North*

Carolina, 587 F.2d 636, 641-42 (4th Cir. 1978), *cert. denied* 441 U.S. 911 (1979). Similarly, the commentators seem sharply divided on the meaning, scope and continued vitality of *Stone. See, e.g.,* Comment, *Development of Federal Habeas Corpus Since Stone* v. *Powell,* 1979 Wis.L.Rev. 1145; Soloff, *Litigation and Relitigation: The Uncertain Status of Federal Habeas Corpus for State Prisoners,* 6 Hofstra L.Rev. 297 (1978); Cover & Aleinkoff, *Dialectical Federalism: Habeas Corpus and the Court,* 86 Yale L.J. 1035 (1977). Regardless of the ultimate result on the merits, a grant of certiorari in this case would give this Court the opportunity to provide substantial guidance to the lower courts in their exercise of federal habeas jurisdiction.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1140

Robert Anthony Williams,
Appellant,
v.
Crispus Nix, Warden of the Iowa State Penitentiary,
Appellee.

On Appeal From The United States District Court
for the Southern District of Iowa

Submitted: November 8, 1982
Filed: January 10, 1983

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge.

ARNOLD, Circuit Judge.

In *Brewer* v. *Williams*, 430 U.S. 387 (1977), the Supreme Court set aside the murder conviction of appellant Robert Anthony Williams because statements leading the police to the body of the victim had been obtained from Williams in violation of his Sixth and Fourteenth Amendment right to counsel. Williams was tried again, and evidence of the discovery of the body and its condition was again admitted against him, this time on the theory, suggested in a footnote in the Supreme Court's opinion, that "the body would have been discovered in any

event," 430 U.S. at 407 n.12, even in the absence of the statements unconstitutionally obtained from the defendant. After the Supreme Court of Iowa affirmed the second conviction, *State* v. *Williams*, 285 N.W.2d 248 (Iowa 1979), defendant again sought federal habeas relief, which the District Court denied, *Williams* v. *Scurr*, No. 80-450-D (S.D. Iowa December 18, 1981). Both the Supreme Court of Iowa and the District Court adopted the "inevitable discovery" or "hypothetical independent source" exception to the exclusionary rule and upheld the second conviction on that basis, finding that the State had proved that the body would have been discovered in any event and that the police had not acted in bad faith in obtaining the excluded statements from defendant. We hold that the record cannot support a finding that the State proved the police did not act in bad faith. We therefore reverse and remand with instructions that the writ issue unless the State commences proceedings to try defendant again within 60 days of this Court's mandate.[1]

I.

On Christmas Eve 1968 the Powers family went to see a wrestling match at the YMCA in Des Moines. Pamela Powers, their ten-year-old daughter, excused herself to go to the bathroom. She did not come back. A little while later, Robert Anthony Williams, a resident of the YMCA, was seen leaving the building with a bundle wrapped in a blanket. Williams, a black man known as "Reverend," had escaped from a mental hospital in Missouri, where he had been a patient for three years, without the knowledge, presumably, of the Des Moines YMCA. Two days later, Pamela Powers's body was found in a

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[1] In addition to his attack on the inevitable-discovery doctrine, Williams advances six other grounds for setting aside his conviction. We express no view as to their merit. He also claims that the District Court should have disqualified itself. We disagree. The District Court properly declined to recuse itself, for the reasons stated in Judge Vietor's memorandum filed June 11, 1981.

ditch east of Des Moines, as a result of statements made by Williams to the police under circumstances to be fully described later. Williams was tried and convicted of deliberate, premeditated murder, and his conviction was affirmed by the Supreme Court of Iowa, *State* v. *Williams,* 182 N.W.2d 396 (Iowa 1970). On habeas, however, the District Court, *Williams* v. *Brewer,* 375 F. Supp. 170 (S.D. Iowa 1974), set this first conviction aside, and this Court, 509 F.2d 227 (8th Cir. 1974), and the Supreme Court, *Brewer* v. *Williams, supra,* affirmed.

The Supreme Court's reasons for invalidating the first conviction are of course the law of this case and are an important part of the background necessary for an understanding of the issues that now arise on this habeas challenge to Williams's second conviction. The defendant, after leaving the YMCA in Des Moines on December 24, turned up in Rock Island, Illinois, two days later. He telephoned Henry McKnight, a lawyer in Des Moines, and McKnight advised him to turn himself in to the police in Davenport, Iowa. Williams did surrender in Davenport, and McKnight went to the police station in Des Moines to speak with the authorities there. "As a result of these conversations, it was agreed between McKnight and the Des Moines police officials that Detective Leaming [of the Des Moines police] and a fellow officer would drive to Davenport to pick up Williams, that they would bring him directly back to Des Moines, and that they would not question him during the trip." *Brewer* v. *Williams, supra,* 430 U.S. at 391. The Supreme Court then described what happened next, *id.* at 392-93:

> The two detectives, with Williams in their charge, then set out on the 160-mile drive. At no time during the trip did Williams express a willingness to be interrogated in the absence of an attorney. Instead, he stated several times that "[w]hen I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." Detective Leaming knew that Williams was a former mental patient, and knew also that he was deeply religious.

The detective and his prisoner soon embarked on a wide-ranging conversation covering a variety of topics, including the subject of religion. Then, not long after leaving Davenport and reaching the interstate highway, Detective Leaming delivered what has been referred to in the briefs and oral arguments as the "Christian burial speech." Addressing Williams as "Reverend," the detective said:

> "I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

Williams asked Detective Leaming why he thought their route to Des Moines would be taking them past the girl's body, and Leaming responded that he knew the body was in the area of Mitchellville—a town they would be passing

on the way to Des Moines.[1] Leaming then stated: "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road."

As the car approached Grinnell, a town approximately 100 miles west of Davenport, Williams asked whether the police had found the victim's shoes. When Detective Leaming replied that he was unsure, Williams directed the officers to a service station where he said he had left the shoes; a search for them proved unsuccessful. As they continued towards Des Moines, Williams asked whether the police had found the blanket, and directed the officers to a rest area where he said he had disposed of the blanket. Nothing was found. The car continued towards Des Moines, and as it approached Mitchellville, Williams said that he would show the officers where the body was. He then directed the police to the body of Pamela Powers.

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[1] The fact of the matter, of course, was that Detective Leaming possessed no such knowledge.

The Court then held that the use of Williams's statements against him violated his Sixth and Fourteenth Amendment right to the assistance of counsel. "Detective Leaming," it said, "deliberately and designedly set out to elicit information from Williams just as surely as - and perhaps more effectively than - if he had formally interrogated him. . . . [H]e purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible." *Id.* at 399. The Court further held that Williams had not waived his right to counsel and that "so clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned." *Id.* at 406. The judgment of this Court granting habeas corpus was affirmed.

It was in this setting that Williams was tried for the second time. This time the State did not offer his own statements in evidence against him, nor did it seek to show that the police had

been led to the victim's body by the defendant. The prosecution did, however, introduce evidence of the discovery of the body and various articles of the victim's clothing, including photographs and results of scientific tests. An evidentiary hearing on defendant's motion to suppress this evidence was held by the District Court of Polk County, Iowa.[2] The evidence was incontestably discovered as a direct result of defendant's unconstitutionally obtained statements, so it was, absent some exception, clearly excludable as "fruit of the poisonous tree." The State argued that the evidence would have been discovered in any event, and cited a footnote in the Supreme Court's opinion:

> [12] The District Court stated that its decision "does not touch upon the issue of what evidence, if any, beyond the incriminating statements themselves must be excluded as 'fruit of the poisonous tree.' " 375 F. Supp. 170, 185. We, too, have no occasion to address this issue, and in the present posture of the case there is no basis for the view of our dissenting Brethren, *post,* at 430 (White, J.); *post,* at 441 (Blackmun, J.), that any attempt to retry the respondent would probably be futile. While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams. *Cf. Killough* v. *United States,* 119 U.S. App. D. C. 10, 336 F.2d 929. In the event that a retrial is instituted, it will be for the state courts in the first instance to determine whether particular items of evidence may be admitted.

430 U.S. at 406-07 n.12.

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[2] The case was later transferred to Linn County for trial on defendant's motion for change of venue.

The state trial court denied the motion to suppress, and held admissible articles of clothing, and photographs of articles of clothing, found on the body, evidence concerning the condition of the body, and the results of medical, chemical, or pathological tests performed on the body. The court found that the State had proved by a preponderance of the evidence that the body would have been discovered in any event, because a police search for the body would have continued, and the body would have been found in substantially the same condition in which it was found. Freezing temperatures, the court found, would have preserved the body from decomposition even into April of 1969. *State* v. *Williams,* No. CR 55805 (Dist. Ct. Polk County, Iowa, May 31, 1977), found in Appendix filed in *State* v. *Williams,* No. 61228 Crim. (Sup. Ct. Iowa, App. filed July 31, 1978), p. 137.[3]

The case then went to trial, and the disputed evidence was introduced against defendant. The defense conceded that Williams had left the YMCA with the little girl's body, but claimed that someone else had killed her and placed her body in Williams's room in the hope that suspicion would focus on him. Williams, the theory went, then panicked, fled, and hid the body by the side of a road, until he came to his senses and gave himself up two days later. The theory is not so far-fetched as it sounds. The State contended that the murder was related to sexual abuse of the victim, and in fact acide phosphatase, a component of semen, was found in her body. But no traces of spermatozoa, living or dead, were found either in the body or on Pamela's clothing. One inference that could be drawn is that the victim was attacked by a sterile male. Williams is concededly not sterile. The State's witnesses suggested that sperm, initially present, had been destroyed by freezing, but this theory was arguably inconsistent with the hypothesis, earlier urged and ac-

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[3] This Appendix will be referred to in this opinion as "App."

cepted in connection with the motion to suppress, that extreme cold would preserve the body's condition, not change it. The defense called experts who testified that freezing would not destroy sperm cells. In addition, although pubic hairs said by an FBI expert to be "like" those of the defendant were found on the victim's clothing, so were other pubic hairs concededly belonging neither to Williams nor to the victim.[4] In any event, the jury found defendant guilty of first-degree murder, and he was sentenced to life in prison. He has been in the Iowa State Penitentiary since his first conviction in 1969.

On appeal, the Supreme Court of Iowa again affirmed. It held that there is in fact a "hypothetical independent source" exception to the exclusionary rule. The exception was stated as follows:

> After the defendant has shown unlawful conduct on the part of the police, the State has the burden to show by a preponderance of the evidence that (1) the police did not act in bad faith for the purpose of hastening discovery of the evidence in question, and (2) that the evidence in question would have been discovered by lawful means.

State v. *Williams*, 285 N.W.2d 248, 260 (Iowa 1979). As to the first element, the Court stated:

> The first question, then, is whether the police acted in bad faith for the purpose of hastening discovery of the body of Pamela Powers. While there can be no doubt that the method upon which the police embarked in order to

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[4] We do not reach defendant's claim that the evidence of premeditation and deliberation was constitutionally insufficient under *Jackson* v. *Virginia*, 443 U.S. 307 (1979). We mention some of the factual disputes at trial only to show that defendant's guilt is not undisputed.

> gain Williams's assistance was both subtly coercive and purposeful, and that its purpose was to discover the victim's body, *see* 430 U.S. at 393, 399, 97 S.Ct. at 1236-37, 1240, 51 L.Ed.2d at 433, 437, we cannot find that it was in bad faith. The issue of the propriety of the police conduct in this case, as noted earlier in this opinion, has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.

Id. at 260-61. As to the second element, the trial court's finding that the body "would have been found in essentially the same condition it was in at the time of the actual discovery," *id.* at 262, even in the absence of assistance from the defendant, was approved.

II.

Our analysis of this case makes it unnecessary to decide whether to recognize the inevitable-discovery or hypothetical-independent-source exception to the rule excluding evidence obtained in violation of the Sixth Amendment right to counsel. We assume *arguendo* that there is such an exception and that the opinion of the Supreme Court of Iowa in this case correctly states the requirements for establishing it. The exception as thus stated requires the State to prove two things: that the police did not act in bad faith, and that the evidence would have been discovered in any event. We hold that the State has not met the first requirement. It is therefore unnecessary to decide whether the state courts' finding that the body would have been

discovered anyway is fairly supported by the record.[5] It is also unnecessary to decide whether the State must prove the two elements of the exception by clear and convincing evidence, as defendant argues, or by a preponderance of the evidence, as the state courts held.

The state trial court, in denying the motion to suppress, made no finding one way or the other on the question of bad faith.[6] Its opinion does not even mention the issue and seems to proceed on the assumption - contrary to the rule of law later laid down by the Supreme Court of Iowa - that the State needed to show only that the body would have been discovered in any event. The Iowa Supreme Court did expresly address the issue, in words that we have quoted, and a finding by an appellate court of a state is entitled to the same presumption of correctness that attaches to trial-court findings under 28 U.S.C. §2254(d). *Sumner* v. *Mata,* 449 U.S. 539, 545-47 (1981). We conclude, however, that the state Supreme Court's finding that

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[5] At the oral argument the question whether the bad-faith element of the test might be dispensed with was raised from the bench, but counsel for the State expressly disclaimed any such position. We agree with counsel and with the Supreme Court of Iowa that if there is to be an inevitable-discovery exception the State should not receive its benefit without proving that the police did not act in bad faith. Otherwise the temptation to risk deliberate violations of the Sixth Amendment would be too great, and the deterrent effect of the exclusionary rule reduced too far. The Supreme Court's footnote in *Brewer* v. *Williams* makes no reference to a bad-faith prong of the test, but we do not read the footnote as intended to be a full-dress statement of the inevitable-discovery exception and its requirements. The footnote does not even establish that there is such an exception (though it may imply it), and the Court in a later case, *United States* v. *Crews,* 445 U.S. 463, 475 n.22 (1980) (plurality opinion), found it unnecessary to address the issue.

[6] The District Court's opinion denying habeas corpus does not discuss the bad-faith question explicitly.

the police did not act in bad faith is not entitled to the shield of §2254(d), for two reasons. First, the Iowa court's discussion of bad faith is not really a finding of fact at all. It is more like a legal conclusion that police conduct later found constitutionally blameless by a large minority of this Court and the Supreme Court cannot amount to bad faith. To put it another way, if four Supreme Court Justices believe something, it must be reasonable.[7] And if the bad-faith passage in the Supreme Court of Iowa's opinion is regarded as a finding of fact that Detective Leaming, though he later turned out to be wrong, honestly believed that his conversation with Williams was not a violation of the Sixth Amendment, the finding must still be rejected. It is utterly without record support, for reasons that we shall explain later in some detail. The finding (if that is what it is) is thus "not fairly supported by the record," and paragraph (8) of §2254(b) permits us to examine the bad-faith question unhampered by any presumption.[8]

If the state court's opinion is read as holding as a matter of law that Detective Leaming did not act in bad faith because one judge of this Court (or three, if the votes to grant rehearing en banc are counted) and four members of the Supreme Court later voted not to exclude the fruits of his effort, then we respectfully

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[7] This Court and the Supreme Court are not alone in being divided on this case. On the first appeal, the Supreme Court of Iowa affirmed Williams's conviction by a vote of five to four. *State* v. *Williams*, 182 N.W.2d 396 (Iowa 1970).

[8] The State suggests that *Stone* v. *Powell*, 428 U.S. 465 (1976), precludes federal habeas review of the admission of evidence regarding the body. We disagree for several reasons. We read *Stone* as limited to Fourth Amendment claims, and the Supreme Court's opinion in *Brewer* v. *Williams* supports that reading. In fact, the dissenting opinion of the Chief Justice, 430 U.S. at 415, 420-29, argues, citing *Stone*, that federal habeas review of the claim that evidence should have been excluded should not be available - a position that the Court necessarily rejected. And the State itself, Brief of Appellee p. 28, seems to concede that *Stone* would in any event bar federal habeas only if a lack of bad faith has been shown.

disagree with the Supreme Court of Iowa. An opinion of the Supreme Court is no less declaratory of the law of the land when a bare majority joins it. The majority rules, in courts as in legislatures, and one vote is a decisive margin. Law is an art, not a science, and it often happens, especially in cases complex and important enough to attract the Supreme Court's attention, that questions of great moment do not receive unanimous answers. We note that the Supreme Court's opinion refers to Detective Leaming's conduct as "*so clear* a violation of the Sixth and Fourteenth Amendments . . . [that it] cannot be condoned." 430 U.S. at 406 (emphasis supplied). There is a sense, we suppose, in which a case decided by one vote is anything but "clear," but we judges of an inferior court are not permitted such speculation.

It is true that a proposition of law subscribed to by four Supreme Court Justices (or perhaps even one) must in some fashion be objectively "reasonable," but that does not meet the issue presented here. The question before us is not whether the Supreme Corut's opinion in *Brewer* v. *Williams* is fairly debatable as a legal matter. Obviously it is. The question is rather what was in Detective Leaming's mind during that car ride back to Des Moines. If he honestly thought he was not violating Williams's rights, then the deterrent purpose of the exclusionary rule would arguably not be impaired by allowing proof of facts that would have come to light in any event. But if he had no such honest belief, and if the courts later hold his conduct unlawful, it matters not how close the division was among the judges. The relevant question - bad faith - is subjective. Possibly if Detective Leaming testified that he thought he was behaving constitutionally, and later the courts unanimously decided otherwise, based on clear preexisting law, the very clarity of the courts' action might be thought to cast a doubt on the truthfulness of the testimony. Could a proposition so lacking in legal support actually have been believed by an officer of the law?, one might ask. But this is not this case. Here, the question

is the reverse: Does the closeness of a later judicial decision necessarily establish that conduct approved by a minority of judges is not in bad faith? We think not. If Leaming conversed with Williams in deliberate violation of the Sixth Amendment, the evidence must be excluded.

We turn, then, to the factual question of Leaming's state of mind at the time. On this question the State concededly has the burden of proof. If the evidence is in equipoise, or if there is no evidence either way, the State must lose. Yet there is not a line of evidence in the record before us that Detective Leaming thought he was within the Constitution. No court, state or federal, has ever so found, and it is not hard to see why, given the state of this record. We do not even have a self-serving statement from Leaming himself that he was unaware of any constitutional violation.[9]

The opinions of the Supreme Court and of the various concurring Justices in *Brewer* v. *Williams* furnish some fairly strong clues as to how that Court might resolve the bad-faith issue (though footnote 12 of the Court's opinion must mean that that issue, like other aspects of the inevitable-discovery doctrine, was to be open for exploration at the second trial and subsequent post-conviction proceedings). Not only does the Court refer to the Sixth Amendment violation as "clear," 430 U.S. at 406. It

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[9] Leaming did not testify at the second trial or at the motion-to-suppress hearing held after the Supreme Court set aside the first conviction. Nor did any other witness testify as to his motivation. There was also no testimony by Leaming at the evidentiary hearing before the District Court on the second habeas petition. Leaming did testify at the motion-to-suppress hearing before the first trial, but the record before us contains only three pages of this testimony, see App. 125-27, and they do not concern the witness's state of mind vis-a-vis Williams's constitutional rights. The transcript of the first trial and of the motion-to-suppress hearing that preceded it is not before us, but we feel sure that if it contained testimony tending to show Leaming's lack of bad faith the State would have called it to our attention.

also describes Leaming's course of conduct as undertaken "deliberately," "designedly," and "purposely," *id.* at 399, and labels the situation before it as "constitutionally indistinguishable from" a previous Supreme Court decision, *Massiah* v. *United States,* 377 U.S. 201 (1964). The Court did not think it was breaking new ground, or holding Detective Leaming to a standard of conduct not theretofore clearly established.

Justice Marshall, concurring, stated that "there can be no doubt that Detective Leaming consciously and knowingly set out to violate Williams' Sixth Amendment right to counsel and his Fifth Amendment privilege against self-incrimination,[10] as Leaming himself understood those rights." *Id.* at 407. Justice Powell, concurring, remarked that "the entire setting was conducive to the psychological coercion that was successfully exploited." *Id.* at 412. He took the position, at least as to Fourth Amendment violations, that "a distinction should be made between flagrant violations by the police, on the one hand, and technical, trivial, or inadvertent violations, on the other," but emphasized that "[h]ere, we have a Sixth Amendment case and also one in which the police deliberately took advantage of an inherently coercive setting in the absence of counsel, contrary to their express agreement. Police are to be commended for diligent efforts to ascertain the truth, but the police conduct in this case plainly violated [Williams's] constitutional rights." *Id.* at 413-14 n.2. And Justice Stevens, concurring, observed that "the State cannot be permitted to dishonor its promise to this lawyer." *Id.* at 415 (footnote omitted).[11]

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[10] The Court's opinion did not reach the Fifth Amendment issue.

[11] *But see* 430 U.S. at 439 (Blackmun, J., dissenting) (an intention to find out where the little girl was "does not equate with an intention to evade the Sixth Amendment.") (footnote omitted).

Our study of the record confirms these hints in the opinions of the Justices in the majority. Not only has the State not borne its burden of proof; what evidence there is on the subject strongly points in the direction of bad faith. In the first place, every court, state or federal, that has made a finding on the issue has found that the police broke an express promise to Henry McKnight, Williams's Des Moines lawyer. The trial court so found before the first trial, see *State* v. *Williams, supra,* 182 N.W.2d at 402; *id.* at 406 (Stuart, J., dissenting); the District Court so found in the first habeas proceeding, *Williams* v. *Brewer, supra,* 375 F. Supp. at 173; and by the time the case reached this Court for the first time the breach of the agreement was no longer in dispute, *Williams* v. *Brewer, supra,* 509 F.2d at 229; *id.* at 236 n.1 (Webster, J., dissenting). The word of the police, like that of everyone else, should be good. The broken promise might be justified if Detective Leaming was hoping (after two days of exposure to freezing temperatures) to find the victim alive. But Leaming did not so testify, and, though it could not be known that Pamela was dead, any hope of finding her alive must have been forlorn. In any event, McKnight had told Leaming that after he and Williams had had a chance to confer in Des Moines the police would be told where to find the body. Leaming did not wish to wait. Instead, as we said on the prior appeal, "the specific purpose of . . . [Leaming's] conversation with . . . [Williams] was to obtain statements and information from . . . [him] concerning the missing girl before . . . [he] could consult with Mr. McKnight." 509 F.2d at 231. Leaming wanted, it seems, not merely to find Pamela or her body, but also to obtain statements from Williams that might be used against him. See 430 U.S. at 408 (Marshall, J., concurring); 375 F. Supp. at 179.

At the oral argument the State did not question that Leaming broke his word, or that he deliberately and designedly set out to elicit information from Williams. It suggested, though, that deliberately seeking information is different from deliberately

violating constitutional rights. Doubtless this is true as a matter of abstract logic. But several aspects of this record are inconsistent with such a reconstruction of Leaming's motivation. The promise not to question Williams was not the only promise broken. Leaming also promised McKnight to bring Williams straight to Des Moines, see 430 U.S. at 391, and this promise also was not kept. Leaming seems to have decided to break his promise not to question Williams almost immediately after the promise was made. Upon arriving in Davenport to pick Williams up, and before beginning the return trip. Leaming told his prisoner that " 'we'll be visiting between here and Des Moines.' " *Ibid.* Thereafter, Williams's Davenport counsel, a lawyer named Kelly, reminded Leaming of his commitment, but "Leaming expressed some reservations." *Id.* at 392. Kelly asked to be allowed to ride back in the car with his client, but this request was refused. Then, in the car, Leaming told Williams that he knew the body was in the area of Mitchellville, although "[t]he fact of the matter, of course, was that Detective Leaming possessed no such knowledge." *Id.* at 393 n.1. We do not wonder that the Supreme Court of Iowa described these tactics as "both subtly coercive and purposeful," 285 N.W.2d at 260, and that the trial court, in its opinion on the motion to suppress made before the second trial, referred to the "U.S. Supreme Court's findings that . . . [the Christian burial] speech was a sly and clever psychological ploy, *designed for mental coercion of the defendant* . . .." App. 136-37 (emphasis supplied). The State seems not to have asked the trial court to make a finding on the issue of bad faith, and, as we have noted, it did not do so. This quotation from its opinion may indicate what that finding would have been. A design to obtain incriminating evidence by mental coercion is a design to violate the Constitution.

Nor is this a case where the police, having successfully devised a means of obtaining evidence, then forthrightly admitted the facts and defended the legality of their own conduct. On the contrary, Leaming disputed the claim that he had agreed with

McKnight not to question Williams on the way back to Des Moines. He also contradicted Kelly's testimony that he had been refused permission to ride back with Williams, and that he had told Leaming that Williams was not to talk with him until they reached Des Moines. The District Court in the first habeas case explicitly resolved these three conflicts in testimony against Leaming, 375 F. Supp. at 176, 177, and the state trial court found as a fact, contrary to Leaming's testimony, that the agreement with McKnight had been made, and expresed "explicit doubts as to the testimony of Detective Leaming." *Id.* at 176 (footnote omitted). These are not the actions of a man who believed he was doing the right thing, only to be confounded later on by a close vote on a question of law.

We hold that the State did not satisfy its burden of proving by a preponderance of the evidence that the police did not act in bad faith in obtaining Williams's statements that led them to the body. Under the inevitable-discovery rule as laid down by the Supreme Court of Iowa, which we accpet *arguendo* for the purposes of this appeal, the motion to suppress should have been granted. Williams's conviction was obtained in violation of the Sixth Amendment, and it must be set aside.

III.

It will inevitably be remarked that our opinion focusses more on the conduct of the police than of the alleged murderer. If Williams is indeed guilty, and if he goes free as a result of our holding, then complete justice may not have been done, even though Williams has served 14 years in prison. A system of law that not only makes certain conduct criminal, but also lays down rules for the conduct of the authorities, often becomes complex in its application to individual cases, and will from time to time produce imperfect results, especially if one's attention is confined to the particular case at bar. Some criminals do go free because of the necessity of keeping government and its servants in their place. That is one of the costs of having and en-

forcing a Bill of Rights. This country is built on the assumption that the cost is worth paying, and that in the long run we are all both freer and safer if the Constitution is strictly enforced.

The judgment of the District Court is reversed. This cause is remanded to it with directions to issue the writ of habeas corpus releasing Williams from custody, unless the State within 60 days of the issuance of our mandate commences proceedings to try Williams again. Our action is also without prejudice to the right of the appropriate authorities of the State of Iowa to commence a civil-commitment proceeding against appellant.

It is so ordered.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1140

Robert Anthony Williams,
Appellant,

v.

Crispus Nix, Warden of the
Iowa State Penitentiary,
Appellee.

Appeal from the United
States District Court
for the Southern District
of Iowa

Filed: March 15, 1983

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON and FAGG, Circuit Judges

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ORDER

The petition for rehearing en banc is denied by an equally divided court.

FAGG, Circuit Judge, dissenting, joined by BRIGHT and ROSS, Circuit Judges.

I dissent from the order denying rehearing en banc.

I offer two reasons for an en banc submission:

First, the panel, in deciding the case, has relied upon a proposition that has not been placed in issue or litigated in the state and federal trial courts: whether Officer Leaming acted in bad faith in obtaining Williams' statement concerning the location of the murdered child's body.

Second, the case is one of significance in Iowa, involving a capital offense where the defendant has been convicted on two occasions by separate juries in different geographical locations within the state.

Specifically, the following chronology supports an en banc hearing:

First, in *Brewer* v. *Williams,* 430 U.S. 387 (1977), the Supreme Court observed by footnote that the state might gain the admissibility of the murdered child's body under a theory of inevitable discovery.

Second, taking the lead offered by the Supreme Court footnote, an inevitable discovery theory was presented to a state trial judge prior to Williams' second trial in a motion to suppress. The prosecutor and defense counsel apparently viewed the contested theory as having only *one* prong, inevitable discovery of the body, and that was the issue presented to the trial judge. This would explain why the ruling of the trial judge made "no finding one way or the other on the question of bad faith" and why the ruling "does not even mention the [bad faith] issue and seems to proceed on the assumption - contrary to the law *later* handed down by the Supreme Court of Iowa - that the State needed to show only that the body would have been discovered in any event". Eighth Circuit Slip opinion at 10, 11. (Emphasis added). I am of the impression that a single issue, inevitable discovery, was involved in the suppression hearing and that the trial court participants should not be charged with anticipating that the case would turn on a good faith/bad faith dichotomy.

Third, after the second trial, Williams appealed to the Iowa Supreme Court. *State* v. *Williams,* 285 N.W.2d 248 (Iowa 1979). As a matter of first impression, the court adopted a *two* pronged inevitable discovery rule. Instead of recognizing that one of the prongs had been litigated in the trial court (inevitable discovery) and the other had not (absence of bad faith), and remanding the case to the trial court for a limited evidentiary hearing, the Iowa Supreme Court did exactly what our panel says it did, namely, in the absence of evidence it ruled as a matter of law that Officer Leaming had acted in good faith.

Fourth, when Williams' petition for habeas relief was presented to District Judge Vietor, the issue formulation, submission, and resolution was the same as it had been in the state trial court: the question of inevitable discovery was at issue, the question of the officer's bad faith was not.

Finally, as I read the panel opinion, I cannot satisfy myself that the issue of the officer's good or bad faith has *ever* been the subject of an evidentiary hearing. If I am correct, then our panel is not in a position comfortably to find as a matter of law that Officer Leaming acted in bad faith, and this court is obligated to consider whether or not some form of limited remand is in order before putting its final imprint upon the case.

For the above reasons I believe the petition for rehearing en banc should be granted.

Judge Gibson also votes to grant the rehearing en banc.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1140-SI

September Term 1982

Appeal from the United States
District Court for the
Southern District of Iowa

Robert Anthony Williams,
Appellant,

vs.

Crispus Nix, Warden and
Attorney General of State of
Iowa,
Appellees.

On the Court's own motion, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

March 15, 1983

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1140

Robert Anthony Williams,
Appellant,

v.

Crispus Nix, Warden of the
Iowa State Penitentiary,
Appellee.

On Appeal from the United States
District Court for the District
of Iowa.

Filed: March 15, 1983

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge.

OPINION ON PETITION FOR REHEARING

ARNOLD, Circuit Judge.

The Court has before it the petition for rehearing filed by the appellee, directed to the panel that heard this appeal. The petition is denied.[1]

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[1] Appellee also filed a petition for rehearing en banc, which is being denied in a separate order entered today.

We deem it appropriate to add a few limited comments with respect to some of the arguments made for the first time in the petition for rehearing.

1. The State argues that the inevitable-discovery exception to the rule excluding evidence obtained in violation of the Sixth Amendment should be available to it even if the police conduct in this case was in bad faith. (It does not argue that this Court's holding, on the record presently before it, that the State had not proved a lack of bad faith was erroneous.) As already indicated in our opinion filed January 10, 1983, *Williams* v. *Nix*, F.2d (8th Cir. 1983), this argument is contrary to an express concession made by the State at the oral argument before us.[2] In the course of the oral argument, counsel for the State stated, Tr. 20, that "I really don't argue with the application of the good faith rule." A few minutes later, a member of the Court brought the matter up again, and the following colloquy occurred:

> Judge Arnold: Let me go back a minute, Mr. McGrane, and read to you what I wrote down that you said a minute ago. I want to see if you really meant this. "I really don't argue with the application of the good faith rule."
>
> Mr. McGrane: Well, I think I'm in a position here where I'm trying to argue for the Iowa Supreme Court's dissertation on the exclusionary rule. I think it's an exceptional analysis and dissertation on the rule and they apply the good faith rule. So I think that the lack of bad faith is where it would hurt us, but I think the lack of bad faith rule should be included. Does that answer the question, I hope.

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[2] A transcript of the tape of the oral argument has been prepared, and copies have been furnished to counsel. The Clerk is directed to file the transcript as part of the records of this case.

Judge Arnold: Yes, sir, it does.

Mr. McGrane: I'd like to leave it in there and I'd like to have this Court find that in fact there was a lack of bad faith.

Both because of this concession, and because to hold otherwise would impermissibly reduce the deterrent effect of the exclusionary rule, see our previous opinion, slip op. at p. 10 n.5, we adhere to our holding that the State, in order to avail itself of the inevitable-discovery exception, should have to prove by a preponderance of the evidence that the police did not act in bad faith.

2. The State also suggests that even if lack of bad faith must be shown, the appropriate standard is objective, not subjective. That is, was the conduct of the police objectively reasonable? Again, we adhere to our previous view that the important question is the state of mind of the police officer at the time that the conduct later held to be unconstitutional occurred. Since the purpose of the exclusionary rule is to deter unconstitutional conduct, exceptions to the rule should not be permitted unless the police honestly believed that they were not behaving unconstitutionally. Again, an exchange between the bench and counsel for the State during oral argument is relevant.

Judge Henley: Is it a question of what he did or what he thought he did?

Mr. McGrane: I think it's what he thought he was doing. That's good faith.

Tr. 21. See also Tr. 18 (Mr. McGrane: "That's not bad faith because he thought the way he was doing it was legal.")

3. Finally, the State argues that to impose a good-faith requirement at this point in the case is unfair to it. At the time of the hearing on the motion to suppress before the second trial, it says, no one knew that lack of bad faith was relevant, and

therefore the State made no attempt to prove this element of the inevitable-discovery exception. It is unfair, the argument runs, for this Court now to hold the conviction invalid on the basis of an issue as to which the State has never been allowed to present proof. The suggestion is made that some kind of remand take place for a hearing, either in the District Court or in the state courts, at which the State would be allowed to attempt to show that no bad faith was involved.

We respectfully disagree with this suggestion for several reasons. The bad-faith question came into the case, in so many words, when the Supreme Court of Iowa decided the appeal from the second conviction. It was the Supreme Court of Iowa, not this Court, that brought the bad-faith issue into the case. It is the opinion of the Supreme Court of Iowa that first pointed out the crucial nature of the issue. No complaint was made by the State at that time that a new issue had been unfairly raised. The opinion of the District Court also mentions the absence of bad faith as one element of the inevitable-discovery doctrine, and again neither side claimed that the question was being unfairly injected into the case.

On the appeal to this Court, both sides briefed the good-faith issue. The State's brief did not argue that it had never had a chance to prove good faith. Nor did it argue that the issue had not been raised in the District Court. It claimed, instead, relying on the rationale of the Supreme Court of Iowa, that it *had* proved good faith. The State did not ask for another chance to satisfy the good-faith prong of the inevitable-discovery doctrine. Then, at the oral argument, the issue became sharper still. As the portions of the oral argument already quoted make clear, there was no suggestion by the State that this Court should not rule on the good-faith issue, or that some kind of additional evidentiary hearing should be held. Indeed, counsel for the State went so far as to say that "I'd like to leave it [the question of bad faith] in there and I'd like to have this Court find that in fact there was a lack of bad faith."

In these circumstances, we cannot agree that fairness requires that the State be given a new chance to show that its agent did not act in bad faith. At the time of the hearing on the motion to suppress, the State was the proponent. It had the burden of proof. It was offering evidence that had been obtained in a way that the Supreme Court of the United States had held unconstitutional. It was given an evidentiary hearing on the issue of admissibility. If, through a mistake of law, it failed to make its case, that should be the end of the matter. It is as if the State had failed to prove one element of the crime, and later argues that it should be given another chance.

The petition for rehearing is denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX E

STATE of Iowa, Appellee,

v.

Robert Anthony WILLIAMS, Appellant.

No. 61228.

Supreme Court of Iowa.

Nov. 14, 1979.

Rehearing Denied Dec. 13, 1979.

Gerald W. Crawford, Des Moines, and Robert Bartels, Iowa City, for appellant.

Thomas J. Miller, Atty. Gen., Faison T. Sessoms, Asst. Atty. Gen., Dan L. Johnston, Polk County Atty., Robert J. Blink and Rodney J. Ryan, Asst. Polk County Attys., for appellee.

Considered by LeGRAND, P. J., and REES, HARRIS, ALLBEE, and McGIVERIN, JJ.

ALLBEE, Justice.

This is an appeal by Robert Anthony Williams from his conviction, on retrial, for first degree murder, a violation of sections 690.1 and 690.2, The Code 1966. The charge arose out of the death of Pamela Powers, which occurred on December 24, 1968.

Williams was initially tried and convicted of this crime in 1969. On appeal from that conviction he contended that the police had obtained certain statements from him in an unlawful manner and that those statements should have been suppressed. This court rejected his argument and, in a five to four decision, affirmed the conviction. *State* v. *Williams,* 182 N.W.2d 396 (Iowa 1970). Defendant then petitioned the United States District Court for the Southern District of Iowa for a writ of

habeas corpus. That court held that defendant's statements had been obtained in violation of his right to counsel and privilege against self-incrimination and sustained the petition. *Williams* v. *Brewer*, 375 F.Supp. 170 (S.D.Iowa 1974). A divided panel of the court of appeals affirmed. 509 F.2d 227 (8th Cir.1974). After petitions for rehearing and rehearing en banc were denied by the court of appeals, the Supreme Court granted certiorari, 423 U.S. 1031, 96 S.Ct. 561, 46 L.Ed.2d 404 (1975), and affirmed, also by a vote of five to four. *Brewer* v. *Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

The facts out of which the prosecution arose have been set out in the prior opinion of this court and in the opinions of the court of appeals and Supreme Court. Factual statements in this opinion will therefore be limited to those necessary to the discussion of the individual issues which defendant has raised. Those issues are considered in the order in which they were presented by his brief.

1.*Rejection of defendant's choice of appointed counsel.* Defendant first complains because trial court refused to appoint Sheldon Otis, of San Francisco, California, as co-counsel for the defense. He claims that as an indigent defendant he had at least a qualified right to select particular attorneys for his defense. Mr. Otis is a member of the bars of California and Michigan with extensive experience in felony trials, and had previously appeared in an Iowa criminal case.

Defendant applied for appointment of counsel on April 14, 1977, stating that he was indigent, that his counsel in the federal habeas corpus action, Robert Bartels, could not represent him in this trial due to previous commitments, and that Mr. Otis was willing and able to undertake representation of defendant. He also requested the appointment of co-counsel for Mr. Otis and stated that Gerald W. Crawford of Des Moines was willing to accept such an appointment. Attached to the application was Williams's affidavit of indigency and a supporting certificate by

a counselor at the state penitentiary, where Williams was incarcerated. No request for a hearing was contained in the application.

On April 21, 1977, District Judge Ray Hanrahan entered an order appointing counsel for defendant. The order recited that the court had conferred with defendant's prior counsel, Mr. Bartels, that defendant was indigent and required appointed counsel, and that prior counsel could not continue his representation. It also recited the court's findings that defendant's interests would be better served by appointment of local counsel and that pre-trial matters and the orderly processing of the case would be facilitated by local counsel. It therefore appointed Roger P. Owens and John C. Wellman, both of the Polk County Offender Advocate's Office, and Gerald W. Crawford as co-counsel for defendant.

Then, on April 27, Williams filed a motion for substitution of counsel, requesting that Mr. Obis be appointed in place of either Mr. Owens and Mr. Wellman, or Mr. Crawford. This motion requested a hearing. Defendant alleged that he was fearful of the effect of community pressure and publicity upon Des Moines counsel and asserted that he had a right under the State and Federal Constitutions and section 775.4, The Code 1977 (current version at Iowa R.Crim.P. 8(1) & 26), to choose the attorneys to be appointed for him. The motion argued that trial court's concerns about pre-trial matters and the orderly processing of the case could be adequately met by the appointment of local co-counsel and stated that Mr. Otis would not claim any transportation expenses. Thus his services would incur no special expense for the state. The motion also noted that Judge Hanrahan had stated that Mr. Otis would have been permitted to appear if he had been retained by Williams.

District Judge J. P. Denato treated the motion as a motion for reconsideration of the ruling on defendant's application for appointment of counsel. Because the motion was treated as one

for reconsideration, and because the original application did not demand a hearing, defendant's request for a hearing at this juncture was denied. The court then denied the motion on its merits.

In denying the motion, Judge Denato found that counsel appointed by Judge Hanrahan were competent, a quality which, in Judge Denato's opinion, included the ability to remain unaffected by pressure and publicity. The court rejected defendant's suggestion that local co-counsel could provide for the orderly disposition of pre-trial matters, reasoning that those matters are often critical to the defense and ought to be the responsibility of chief trial counsel. Further, Judge Denato noted that Mr. Otis "would be involved in trial in California well into May," which would be an impediment to the speedy disposition of the case. Trial court noted that it had not been established, at the time of the ruling on the original application, that Mr. Otis would serve for local fees only, without charging for travel time, but did not rely on this fact. Finally, the court referred to the plan for appointing criminal defense counsel in Polk County and pointed out that Mr. Otis was not on the appointment list.

Defendant now presents four arguments which he insists support at least a qualified right on the part of indigent criminal defendants to choose particular counsel to represent them. The first is based on the sixth amendment and *Faretta* v. *California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The second is an equal protection argument. The third is based on due process, which also supports his claim that he was entitled to a hearing on the question. His final argument arises out of the language of section 775.4, which provides for appointment of counsel for indigents.

[1,2] While there is an absolute right to counsel, no defendant, indigent or otherwise, has an absolute right to be represented by a particular lawyer. *See, e.g., United States* v. *Vargas-Martinez,* 569 F.2d 1102, 1104 (9th Cir. 1978); *United*

States v. *Poulack*, 556 F.2d 83, 86 (1st Cir.), *cert. denied*, 434 U.S. 986, 98 S.Ct. 613, 54 L.Ed.2d 480 (1977); *United States* v. *Dinitz*, 538 F.2d 1214, 1219 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104, 97 S.Ct. 1133, 51 L.Ed.2d 556 (1977); *cf. United States* v. *Buttorff*, 572 F.2d 619, 627 (8th Cir.), *cert. denied*, 437 U.S. 906, 98 S.Ct. 3095, 57 L.Ed.2d 1136 (1978); *United States* v. *Hinderman*, 528 F.2d 100, 102-03 (8th Cir. 1976) (no right to representation by laymen). A defendant's right to choose particular counsel is circumscribed by trial court discretion, which may be exercised to effectuate an orderly disposition of the case. *United States* v. *Dinitz*, 538 F.2d at 1219; *Harling* v. *United States*, 387 A.2d 1101, 1104 (D.C. 1978). Thus, trial courts have generally been vested with broad discretion in determining the particular attorney to be appointed to represent an indigent defendant. *See, e. g., Drumgo* v. *Superior Court*, 8 Cal.3d 930, 106 CalRptr. 631, 506 P.2d 1007 (1973); *Baker* v. *Commonwealth*, 574 S.W.2d 325, 326-27 (Ky.Ct.App.1978); *State* v. *Hollins*, 512 S.W.2d 835, 838 (Mo.Ct.App. 1974); *People* v. *Medina*, 44 N.Y.2d 199, 207, 404 N.Y.S.2d 588, 592-93, 375 N.E.2d 768, 772 (1978); *Commonwealth* v. *Chumley*, 482 Pa. 626, 646 n.3, 394 A.2d 497, 507 (1978), *cert. denied*, 440 U.S. 966, 99 S.Ct. 1515, 59 L.Ed.2d 781 (1979); *Brewer* v. *State*, 4 Tenn.Ct.Cr.App. 265, 270, 470 S.W.2d 47, 49 (1970); *Watson* v. *Black*, 239 S.E.2d 664, 668 (W.Va.1977); *State* v. *Shears*, 68 Wis. 2d 217, 259-60, 229 N.W.2d 103, 124 (1975); *Irvin* v. *State*, 584 P.2d 1068, 1070 (Wyo. 1978). *See generally* Annot., 66 A.L.R.3d 996 (1975). In fact, that discretion has been interpreted to encompass the adoption of policies which specifically preclude the defendant from selecting his lawyer. *United States* v. *Davis*, 604 F.2d 474, at 478-479 (7th Cir. 1979).

[3,4] Because we are impressed by the overwhelming support for the rule, we hold that trial courts have broad discretion, both in the first instance, and in considering a motion for substitution of counsel, in choosing the particular lawyer to represent an indigent defendant. The concerns stated by both

district judges in this case regarding the need for local counsel to deal effectively and promptly with pre-trial matters are reasons sufficient to characterize their actions as being well within the boundaries of sound discretion.

[5] Defendant's specific arguments remain to be answered. His first, based on the sixth amendment, is summarized by this passage from his brief:

> In *Faretta* v. *California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the Court recognized that the right to counsel was a *personal* right that included the right to proceed *without* an attorney in a criminal case. Surely if the defendant has the right to choose to represent himself despite the serious practical problems this might cause at trial, he also has the right to choose to have a particular attorney represent him, ...

This argument entirely ignores the basis of *Faretta.* The Court found in that case that the right to proceed without counsel was an *independent* right *See* 422 U.S. at 819 n.15, 95 S.Ct at 2533, 45 L.Ed.2d at 572. Because the source of the right of self-representation in the sixth amendment is independent of the right to self-representation does not imply a right to choice of particular counsel. *United States* v. *Dolan,* 570 F.2d 1177, 1183 (3d Cir. 1978).

[6] The equal protection claim is without merit because the right to choice of counsel by both indigent and non-indigent defendants is limited by trial court discretion to maintain an orderly trial process. Trial court, in both rulings, placed reasonable reliance upon such a ground in denying defendant's request for Mr. Otis.

[7] Defendant next claims that due process gives him both the right to choose his counsel and the right to a hearing on the matter. No authority is cited for the proposition that a substantive independent right of choice of counsel is a component of due

process. Nor is any likely to be found. Rather, such a qualified due process right may exist by incorporation of the right to counsel established by the sixth amendment. And, insofar as that is true, defendant's contention has already been answered.

[8] Nor does the claim that due process gave defendant a right to a hearing on this matter have merit. First, it is doubtful that defendant has established an entitlement to a choice of particular counsel. In the absence of such an entitlement, the state is not required to give him procedural due process. *Leis* v. *Flynt*, 439 U.S. 438, 442, 99 S.Ct. 698, 701, 58 L.Ed.2d 717, 723 (1979)(per curiam).

Moreover, the facts of this case do not show any need for a hearing. None of the facts alleged in the application or the motion were controverted. Both judges appear to have accepted those facts as established.[1] The application did not request a hearing, although such a request was required by the local rules. The rulings both indicated that each judge conferred with Mr. Bartels, who had prepared both the application and the motion. In addition, defendant submitted a brief in support of his motion for substitution. Finally, defendant gives no suggestion or hint as to what further benefit he might have gained by a formal hearing. While it would have been preferable to grant defendant a hearing when it was requested, if for no other reason than to enable the court to exercise a fully informed discretion, failure to do so on the facts of this case did not deny defendant due process.

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[1]As we have noted, Judge Denato did rule that it had not been established at the time of the ruling on the first application that Mr. Otis would serve for local fees only. That matter, however, was not mentioned by either judge as a factor in the exercise of discretion and Judge Denato specifically discounted its importance.

[9] The fourth ground upon which defendant seeks to base his right to a choice of counsel is the text of section 775.4.[2] He argues that because the "allow him to select" language is the first alternative listed, it ought to be preferred. The statute establishes in the trial court the power to appoint counsel by either of two alternative means. We find no stated preference in the statute for either alternative. Trial court exercised its discretion by selecting one of the two listed methods. Its selection was not an abuse of that discretion.

II. *Use of the inevitable discovery doctrine.* In the second division of his brief Williams addresses the issue of whether trial court should have suppressed evidence relating to the body of the murder victim, including clothing found on the body and results of tests performed on the body. His argument is that suppression was required because the evidence was the "fruit of the poisonous tree." That is, the body was discovered as a result of statements by defendant which the police obtained in an unlawful manner. The State answers this contention by arguing that the search which was under way for the victim would have discovered the body in any event, even absent defendant's assistance.

[10] Thus, this case squarely presents the question of whether the doctrine of inevitable discovery, more accurately referred to

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[2] **775.4 Right to counsel.** If the defendant appears for arraignment without counsel, he must, before proceeding therewith, be informed by the court of his right thereto, and be asked if he desires counsel; and if he does, and is unable to employ any, the court must allow him to select or assign him counsel, not exceeding two, who shall have free access to him at all reasonable hours.

as the hypothetical independent source rule,[3] is a constitutionally permissible exception to the exclusionary rule. Encompassed in that broad question are inquiries into the precise boundaries and requirements of the rule, and into the adequacy of the factual showing made by the State for invocation of the doctrine here.

[11] Because the police used unlawful methods to obtain defendant's assistance in recovering the body of Pamela Powers, the fact of his assistance and his statements must be suppressed. *Brewer* v. *Williams,* 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). It has long been the rule that evidence which is derived from such unlawfully gained statements must also be suppressed. *Wong Sun* v. *United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). The Supreme Court has recognized two exceptions to this rule. The first, stated in *Silverthorne* itself, is that the Government may use such derivative evidence if knowledge of it was gained from an independent source. 251 U.S. at 392, 40 S.Ct. at 183, 64 L.Ed. at 321. The second, first recognized in *Nardone* v. *United States,* 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307, 312 (1939), and more fully developed in later cases,[4] allows use of

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[3] As we shall explain, the rule is an extension of the independent source exception to the rule of exclusion found in *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). And the word "inevitable" overstates the actual second requirement of the rule, which is that the State show by a preponderance of the evidence that the disputed evidence would have been found without the constitutional violation. Nevertheless, because of the overwhelming use of the phrase "inevitable discovery" by other courts and commentators, we accede to that usage.

[4] *United States* v. *Ceccolini,* 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978); *Brown* v. *Illinois,* 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); *Johnson* v. *Louisiana,* 406 U.S. 356, 92 s.Ct. 1620, 32 L.Ed.2d 152 (1972); *Wong Sun* v. *United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

such evidence whenever the connection between the primary illegality and the derivative evidence sought to be introduced has been so sufficently attenuated that the taint is dissipated. The inevitable discovery rule which the State here proposes has never been recognized by the Supreme Court as a third exception to the *Silverthorne* rule. That Court has declined the opportunity to consider the rule's constitutionality on several occasions. *See, e. g., Fitzpatrick* v. *New York,* 414 U.S. 1050, 1051, 94 S.Ct. 554, 555, 38 L.Ed.2d 338, 339 (1973) (White, J., dissenting from denial of certiorari); Note, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules,* 74 Colum.L.Rev. 88, 91 n.22 (1974) [hereinafter cited as Columbia Note]. This, however, may change in the near future. *See United States* v. *Crews,* 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979)(granting certiorari to review *Crews* v. *United States,* 389 A.2d 277 (D.C.1978) (en banc), which rejected the rule, *id.* at 291-95, and reversed an armed robbery conviction). It was the subject of comment in *Brewer* v. *Williams,* 430 U.S. at 406 n.12, 97 S.Ct. at 1243, 51 L.Ed.2d at 441. For the moment, however, we are left to consider for ourselves the constitutional propriety of the inevitable discovery doctrine. We may call to our aid in this task a substantial body of law from lower federal courts and the courts of other states. In addition, we have the benefit of the opinions of several commentators on this subject.

The hypothetical independent source exception to the rule of exclusion has the support of a "vast majority" of all the courts which have considered it. 3 W. LaFave, *Search and Seizure* § 11.4, at 622 (1978). This includes six of the United States Courts of Appeals. *See United States* v. *Schmidt,* 573 F.2d 1057, 1065 n.9 (9th Cir.) (alternative rationale), *cert. denied,* 439 U.S. 881, 99 S.Ct. 221, 58 L.Ed.2d 194 (1978); *United States* v. *Ceccolini,* 542 F.2d 136, 140-41 (2d Cir. 1976), *rev'd on other grounds,* 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978); *Owens* v. *Twomey,* 508 F.2d 858, 865-66(7th Cir. 1974) (alternative rationale); *Virgin Islands* v. *Gereau,* 502 F.2d 914, 927-28 (3d Cir. 1974), *cert. denied,* 420 U.S. 909, 95 S.Ct. 829, 42 L.Ed.2d 839

(1975); *United States* v. *Seohnlein,* 423 F.2d 1051, 1053 (4th Cir.)(alternative rationale), *cert. denied,* 399 U.S. 913, 90 S.Ct. 2215, 26 L.Ed.2d 570 (1970); *Wayne* v. *United States,* 115 U.S.App.D.C. 234, 238, 318 F.2d 205, 209 (D.C.Cir.), *cert. denied,* 375 U.S. 860, 84 S.Ct. 125, 11 L.Ed.2d 86 (1963); *cf. United States* v. *Melvin,* 596 F.2d 492, 500 (1st Cir. 1979). *But see United States* v. *Schipani,* 414 F.2d 1262, 1266 (2d Cir. 1969), *cert. denied,* 397 U.S. 922, 90 S.Ct. 902, 25 L.Ed.2d 102 (1970); *United States* v. *Paroutian,* 299 F.2d 486, 489 (2d Cir. 1962) (rejecting as inadequate the Government's claim that evidence "might" have been discovered independently). *See also Somer* v. *United States,* 138 F.2d 790, 792 (2d Cir. 1943)(Learned Hand, J.). And the state courts which have recently been confronted with the issue appear to be nearly unanimous in their recognition and approval of the rule. *See, e. g., State* v. *Tillery,* 107 Ariz. 34, 39, 481 P.2d 271, 276 (en banc), *cert. denied,* 404 U.S. 847, 92 S.Ct. 151, 30 L.Ed.2d 84 (1971); *State* v. *Washington,* 120 Ariz. 229, 231, 585 P.2d 249, 251 (Ct.App.1978)(reciting but not applying inevitable discovery); *Lockridge* v. *Superior Court,* 3 Cal.3d 166, 170, 89 Cal. Rptr. 731, 734, 474 P.2d 683, 686 (1970), *cert. denied,* 402 U.S. 910, 91 S.Ct. 1387, 28 L.Ed.2d 652 (1971); *People* v. *Emanuel,* 87 Cal.App.3d 205, 214, 151 Cal.Rptr. 44, 50 (1978); *Sheff* v. *State,* 301 So.2d 13, 18 (Fla.Dist.Ct.App.1974), *aff'd on other grounds,* 329 So.2d 270 (1976); *People* v. *Pearson,* 67 Ill.App.3d 300, 308-10, 24 Ill. Dec. 173, 179-80, 384 N.E.2d 1331, 1337-38 (1978); *People* v. *Moore,* 55 Ill.App.3d 706, 711-12, 13 Ill.Dec. 499, 502-03, 371 N.E.2d 194, 197-98 (1977), *aff'd on other grounds,* 61 Ill.App.3d 694, 19 Ill.Dec. 15, 378 N.E.2d 516 (1978); *Leuschner* v. *State,* 41 Md.App. 423, 428, 397 A.2d 622, 626 (1979); *People* v. *Tucker,* 19 Mich.App. 320, 328-30, 172 N.W.2d 712, 717-18 (1969), *aff'd,* 385 Mich. 594, 189 N.W.2d 290 (1971), *acq. in result Michigan* v. *Tucker,* 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974); *People* v. *Payton,* 45 N.Y.2d 300, 313-14, 408 N.Y.S.2d 395, 401-02, 380 N.E.2d 224, 230-31 (1978), *forma pauperis granted & probable*

jurisdiction noted, 439 U.S. 1044, 99 S.Ct. 718, 58 L.Ed.2d 703 (1978); *People* v. *Fitzpatrick,* 32 N.Y.2d 499, 506-08, 346 N.Y.S.2d 793, 797-98, 300 N.E.2d 139, 141-42, *cert. denied,* 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973); *State* v. *McKendall,* 36 Or.App. 187, 192, 584 P.2d 316, 320 (1978) (applying inevitable discovery test codified in Or.Rev.Stat. § 133.683 (1977)); *Commonwealth* v. *Wideman,* 478 Pa. 102, 105, 385 A.2d 1334, 1336 (1978); *Ex parte Parker,* 485 S.W.2d 585, 589 (Tex.Cr.App.1972). *See also People* v. *Kusowski,* 403 Mich. 653, 662, 272 N.W.2d 503, 506 (1978) (separate opinion); Annot., 43 A.L.R.3d 385, 404-06 (1972); *cf. State* v. *Sickels,* 275 N.W.2d 809, 814 (Minn.1979).

Three appellate courts have clearly rejected the rule. *United States* v. *Houltin,* 525 F.2d 943, 949 (5th Cir.), *rehearing denied,* 533 F.2d 1135 (5th Cir. 1976) *vacated in part on other grounds mem. sub nom., Croucher* v. *United States,* 429 U.S. 1034, 97 S.Ct. 725, 50 L.Ed.2d 745 (1977); *Parker* v. *Estelle,* 498 F.2d 625, 629 n.12 (5th Cir.), *rehearing denied,* 503 F.2d 567 (5th Cir. 1974), *cert. denied,* 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450 (1975); *United States* v. *Castellana,* 488 F.2d 65, 68, *modified on other grounds en banc,* 500 F.2d 325 (5th Cir. 1974); *United States* v. *Peurifoy,* 22 C.M.A. 549, 552, 48 C.M.R. 34, 37 (1973); *Crews* v. *United Sttaes,* 389 A.2d 277, 291-95 (D.C.1978) (*en banc*), *cert. granted,* 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979); *see United States* v. *Massey,* 437 F.Supp. 843, 853 n.3 (M.D.Fla.1977). *But see Gissendanner* v. *Wainwright,* 482 F.2d 1293, 1297 (5th Cir. 1973). And one other court has published an opinion which might be read either as an absolute rejection of the rule, or as a refusal to apply the rule to the facts of that case. *United States* v. *Griffin,* 502 F.2d 959, 960-61 (6th Cir.) (per curiam), *cert. denied,* 419 U.S. 1050, 95 S.Ct. 626, 42 L.Ed.2d 645 (1974).

Two courts have held that the facts of the particular cases before them would not support application of the rule, and have reserved the issue for a proper case. *United States* v. *Kelly,* 547

F.2d 82, 86 (8th Cir. 1977); *State* v. *Ercolano*, 79 N.J. 25, 35-36, 397 A.2d 1062, 1067 (1979). It is interesting to note, however, that *Kelly* makes no mention of *United States* v. *DeMarce*, 513 F.2d 755, 758 (8th Cir. 1975), which appeared to make use of the doctrine without discussion. And at least one lower court in New Jersey has referred to inevitable discovery approvingly. *State* v. *Mather*, 147 N.J.Super. 522, 526-28, 371 A.2d 758, 761-62 (1977).

The commentators split more evenly on the constitutionality of the inevitable discovery doctrine. *Compare* 3 W. LaFave, *supra* § 11.4, at 620-28; LaCount & Girese, *The "Inevitable Discovery" Rule, An Evolving Exception To The Constitutional Exclusionary Rule*, 40 Alb.L.Rev. 483 (1976); Maguire, *How To Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J.Crim.L.C. & P.S. 307 (1964) (all approving the rule), *with* Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 Calif.L.Rev. 579, 629-30 (1968); Comment, *Fruit of the Poisonous Tree: Recent Developments As Viewed Through its Exceptions*, 31 U.Miami L.Rev. 615, 626-29 (1977); Columbia Note, *supra* at 99-101; Comment, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U.Pa.L.Rev. 1136, 1142-47 (1967) [hereinafter cited as Pa.Comment] (all criticizing the doctrine). *See also* Model Code of Pre-Arraignment Procedure § 290.2(5) (Proposed Official Draft, 1975) (proposing a codified version of the rule).

[12,13] On consideration of these authorities, we have detemined that the position espoused by Professor LaFave is the one which conforms to the mandates of the Federal Constitution. Professor LaFave would have courts permit the use of inevitable discovery as an exception to the exlusionary rule when the State has met a two part test. First, use of the doctrine should be permitted only when the police have not acted in bad faith to accelerate the discovery of the evidence in question. Second, the State must prove that the evidence would have been found without the unlawful activity and how that discovery

would have occurred. Courts must use extreme caution to avoid applying the rule on the basis of hunch or speculation. We adopt this rule because it fits with the rationale of the two better established exceptions to the exclusionary rule, and because it meets the two most substantial complaints which are generally made by opponents of the inevitable discovery doctrine.

Although the inevitable discovery rule is probably best viewed as an expansion of the independent source exception which allows substitution of a hypothetical source for an actual one, 3 W. LaFave, *supra* § 11.4, at 620-21, Columbia Note, *supra* at 90, a better understanding of it can also be gained by examination of the history of the attenuation exception. In laying the groundwork for establishing the attenuation test in *Nardone,* Justice Frankfurter recognized that "[a]ny claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped." 308 U.S. at 340, 60 S.Ct. at 267, 84 L.Ed. at 311. He observed two concerns which must be harmonized: "the stern enforcement of the criminal law" and the protection of the individual against governmental infringement on rights guaranteed by the Constitution.[5] *Id.* The Court sought to give effect to each of these competing interests by the application of the attenuation exception, which was referred to as "a matter of good sense." *Id.* at 341, 60 S.Ct. at 268, 84 L.Ed. at 312. So it is here as well. Those who argue against the inevitable discovery rule have failed to overcome the "heavy handicap" in their campaign to exclude relevant evidence. The rule is a "good sense' solution to the problem of balancing the interests involved. *See* Columbia Note, *supra* at 99 ("exception does make a certain pragmatic sense").

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[5] In this case we are concerned with protection of the sixth amendment right to counsel. *Brewer* v. *Williams,* 430 U.S. at 398, 97 S.Ct. at 1239, 51 L.Ed.2d at 436.

Another helpful piece of attenuation history is found in *Wong Sun*, where the Court rejected a "but for" test. That is, the Court refused to "hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." 371 U.S. at 487-88, 83 S.Ct. at 417, 9 L.Ed.2d at 455. The Seventh Circuit found from the quoted language and that which immediately followed that *Wong Sun* established the inevitable discovery rule. *Twomey*, 508 F.2d at 865-66. While we cannot agree that *Wong Sun* goes so far, *Wong Sun* is certainly consistent with, and poses no obstacle to, the adoption of an inevitable discovery test such as the one we have proposed. That which we find in *Wong Sun* is a justification for the inevitable discovery rule's lack of amenability to a mechanical application.

As already suggested, the version of the rule which we adopt also meets two of the most regularly heard complaints against the inevitable discovery rule. The first of these is that its use will defeat the purposes of the exclusionary rule. *See, e. g., Crews*, 389 A.2d at 293.

In *Brown* v. *Illinois*, 422 U.S. 590, 599-600, 95 S.Ct. 2254, 2259-60, 45 L.Ed.2d 416, 424-25 (1975), the Court recited the two regularly recognized purposes of the exclusionary rule: deterrence of lawless conduct by the police and protection of judicial integrity.[*] The opponents of the inevitable discovery doctrine claim that it frustrates the deterrence purpose by sanctioning "end runs and shortcuts." *Crews*, 389 A.2d at 293-94; *Castellana*, 488 F.2d at 68; Pa. Comment, *supra* at 1143. The fear seems to be that the police will proceed in an unlawful manner to hasten discovery of evidence on the assumption that it will be possible to persuade a judge at a later date that the evidence would have been found by lawful means in any event.

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[*] Of course, judicial integrity is not enhanced by an overzealous exclusion of relevant evidence.

[14] The answer to this objection is to include as an element of the inevitable discovery exception a requirement that the prosecution show that the police did not act in bad faith to hasten discovery of the questioned evidence. *Cf. Brown* v. *Illinois,* 422 U.S. at 605, 95 S.Ct. at 2262, 45 L.Ed.2d at 428 (referring to "purposefulness" of illegal police conduct). Obviously, bad faith means something more than just acting unlawfully, for if the police action was lawful the issue would never have arisen in the first place. And the question of bad faith may require different treatment, depending upon the nature of the lawless action taken by the police. That is, the initial unlawful activity might, for example, be a violation of either the fourth, the fifth or the sixth amendments. Police action taken solely to avoid the warrant clause of the fourth amendment, *see United States* v. *Griffin,* 502 F.2d at 960-61, *discussed approvingly in* 3 W. LaFave, *supra* § 11.4, at 624, might well provide a clear-cut case for refusal to apply the inevitable discovery exception. In such a situation the application of inevitable discovery would result in deletion of the warrant clause from the fourth amendment because that clause's sole purpose is to insert a magistrate between the proposed subject of a search and police officers who assert probable cause for the search. *See, e. g., Johnson* v. *United States,* 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436, 440 (1948). By this discussion we do not mean to intimate that violations of the fourth amendment will receive any greater or lesser scrutiny than violations of other constitutional safeguards. Rather, we intend only to illustrate what we mean when we refer to bad faith on the part of the police.

The second objection to inevitable discovery is "the ambiguity, subjectivity, and consequent potential for abuse inherent in its application." *Crews,* 389 A.2d at 294. This objection, however, does not go to the exception itself, or the exception in the abstract. Rather, it is an expression of concern that the rule may be applied in a "loose and unthinking fashion." 3 W. LaFave, *supra* § 11.4, at 623. The answer to the objection lies in part in our statement of the rule, and in part in the manner in which questions of this kind are reviewed by the appellate courts of this state.

[15-17] In order to satisfy its burden, the State must show that the evidence *would* have been discovered. A showing that discovery *might* have occurred is entirely inadequate. Two points arise here. First, the State must show how the evidence would have been discovered. The precision required here will vary somewhat with the circumstances of the case. Situations in which the evidence was well hidden, or in which time would be a critical factor, would require a better showing on the part of the State as to exactly how or when discovery would have occurred. Second, a determination that a discovery would have come about must rest upon the record. Judges will not be permitted to supplement the record by reference to apparently similar cases in which evidence was discovered. *Commonwealth* v. *Wideman*, 478 Pa. at 107, 385 A.2d at 1337. This is not to deny the availability of judicial notice in appropriate cases, however.

The potential difficulties of ambiguity and subjectivity are also alleviated by the fact that the appellate courts of this state review such questions de novo. *State* v. *Ege*, 274 N.W.2d 350, 352 (Iowa 1979). Factual, as well as legal, determinations made by a single judge and questioned by one party or the other are open to full review by at least five persons of differing backgrounds and philosophies. A convergence of a majority of those viewpoints is good, and entirely adequate, protection against subjectivity and ambiguity.

[18] The defendant also argues that if the exception is recognized the State should be required to meet a clear and convincing standard of proof, rather than a mere preponderance. The great weight of case law, however, supports the proposition that after the defendant has shown police conduct which is unconstitutional, the burden shifts to the State to demonstrate, by a preponderance of the evidence, that one of the exceptions to the exclusionary rule applies. *Alderman* v. *United States*, 394 U.S. 165, 183, 89 S.Ct. 961, 972, 22 L.Ed.2d 176, 192 (1969); *United States* v. *Falley*, 489 F.2d 33, 41 (2d Cir. 1973); *cf. United States* v. *Matlock*, 415 U.S. 164, 177 n.14, 94 S.Ct. 988,

996, 39 L.Ed.2d 242, 253 (1974) (general statement regarding all suppresion hearings); *Lego* v. *Twomey,* 404 U.S. 477, 486-87, 92 S.Ct. 619, 625-26, 30 L.Ed.2d 618, 626 (1972) (*Miranda* violation). On the basis of these authorities, we hold that the State's burden is met by a preponderance of the evidence.

In summary, then, we hold that the inevitable discovery rule is a constitutionally sound exception to the rule of exclusion first propounded in *Silverthorne.* After the defendant has shown unlawful conduct on the part of the police, the State has the burden to show by a preponderance of the evidence that (1) the police did not act in bad faith for the purpose of hastening discovery of the evidence in question, and (2) that the evidence in question would have been discovered by lawful means. This second element may require greater or lesser precision in showing the manner or time of discovery depending upon the circumstances of the case.

We now proceed to examine the facts of this case in the light of the standard just stated. Defendant has, of course, met his burden to show unconstitutional police conduct. That was established by the Supreme Court in *Brewer* v. *Williams.*

[19] The first question, then, is whether the police acted in bad faith for the purpose of hastening discovery of the body of Pamela Powers. While there can be no doubt that the method upon which the police embarked in order to gain Williams's assistance was both subtly coercive and purposeful, and that its purpose was to discover the victim's body, *see* 430 U.S. at 393, 399, 97 S.Ct. at 1236-37, 1240, 51 L.Ed.2d at 433, 437, we cannot find that it was in bad faith. The issue of the propriety of the police conduct in this case, as noted earlier in this opinion, has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.

Thus we proceed to consider the facts bearing on the second question: whether a preponderance of the evidence indicates that the body of Pamela Powers would have been found by lawful means, without the unlawfully obtained assistance of defendant.

On December 24, 1968, the family of Pamela Powers attended a wrestling tournament held at the YMCA in Des Moines. Pamela excused herself to go wash her hands before eating a candy bar. No one has been willing to acknowledge having seen her alive since.

Shortly after the disappearance of the Powers girl, and after a search for her had begun, defendant left the YMCA carrying a bundle which, observers later concluded, contained the body of Pamela Powers. Observers also obtained the license number of the green 1959 Buick in which he departed.

On December 25, two discoveries were made which gave some indication of the direction and route of defendant's flight from Des Moines. First, the car which he drove from the YMCA was discovered in Davenport, Iowa, which is located several hours east of Des Moines on Interstate 80. Later several items of clothing belonging to the victim, some clothing belonging to defendant, and an army blanket like that used to wrap the bundle which Williams carried out of the YMCA were found at a rest stop on Interstate 80 near Grinnell, between Des Moines and Davenport.

Police officials concluded that the items of clothing found at the Grinnell rest stop were probably among the last items to be taken from the Powers girl. They therefore came to the belief that Pamela Powers would be found somewhere in the Grinnell area, or west of Grinnell, in the direction of Des Moines. They also formed the opinion that she was probably somewhere near Interstate 80.

On that basis, a searach was initiated on the 26th of December. Maps of Poweshiek and Jasper Counties were obtained. Grinnell is in Poweshiek County. Jasper County lies directly west of Poweshiek County. Polk County, in which Des Moines is located, lies directly west of Jasper County. Interstate 80 divides both Jasper and Poweshiek Counties into nearly perfect north and south halves.

On the two county maps, the Bureau of Criminal Investigation agent in charge of the search drew a grid pattern encompassing an area from roughly seven miles north of Interstate 80 to seven miles south of Interstate 80. The search thus began at the eastern border of Poweshiek County, twenty-one miles east of Grinnell, and moved westward. Teams of from four to six volunteers were each assigned to search an area on the gridded maps. Searchers were instructed to check all roads and ditches. While ditches were to be inspected from the road, searchers were told to get down and look into culverts. They were also instructed to search abandoned farm buildings and any other places where a small child could be secreted.

The agent in charge of the search testified at the suppression hearing that he had received reports that the searchers were following their instructions. This included getting down into ditches to look into culverts.

The search was called off at 3:00 p. m., when the BCI agents directing the volunteer searchers were told to meet Captain Leaming of the Des Moines Police Department at the truck stop near Grinnell. The cancellation was ordered because no officers remained to direct the search. In response to questions by the trial judge, the officer in charge of the search stated that he was "under the impression that there was a possibility that we could be led to the body at that time."

When the search ended at 3:00 p. m., it had been carried to the western edge of Jasper County, that is, the Jasper County-Polk County line. It was never resumed because defendant led

the police to the body of Pamela Powers. That body was in Polk County, two and one-half miles west of the Jasper County line. It rested next to a culvert in a ditch beside a gravel road which was about two miles south of Interstate 80.

The agent in charge of the search testified that had the body not been found by other means, the search would have continued west into Polk County, and that, in his opinion, the body would have been found within three to five hours after the search crossed the Jasper County-Polk County line.

It is not entirely clear, as defendant points out, when the search would have been reinitiated. It is clear, however, that the search would have proceeded into Polk County. We may infer from the testimony that it would have continued without hestitation, had the officers in charge not been called away. And, even after the interruption, the search would have begun again, although the precise time is not clear.

In light of the other facts, however, the precise time at which the search would have covered the area in which Pamela Powers's body lay was not of critical importance. The State produced an expert who testified that, based on the records of temperature from the month of December 1968 through the month of April 1969, the body of Pamela Powers would have been preserved in the state in which it was actually found until April of 1969. The only suggestion to the contrary came from testimony that the body had been disturbed by animals. This aspect, however, was not pursued at any length in the suppression hearing. Further, damage of that kind after nearly two days of exposure was minimal, suggesting that another two days, for instance, would have had little effect.

The State also introduced photographs showing the body as it was actually found. Those photographs show that Pamela Powers's body would not have been hidden by the inch of snow which accumulated in the area on the evening of December 26. The body was dressed in an orange and white striped blouse,

which is what the officer who discovered the body saw first. In addition, the left leg of the body was poised in midair, where it would not have been readily covered by a subsequent snowfall.

It is true, as defendant argues, that Captain Leaming testified at the first trial that it took officers about five minutes to discover the body after Williams led them to the proper vicinity. While those officers did search on foot, Captain Leaming did not testify that any of them actually went down into the ditch.

[20] Our review of the evidence leads to the conclusion that persons conducting a search such as the one which was conducted in Poweshiek and Jasper Counties and which was to be continued into Polk County would have found the body of Pamela Powers. Her body was frozen to the side of a cement culvert. It would have been nearly impossible for anyone who came down into the ditch to look into the culvert, as the searchers were doing, to fail to see the child's body. We thus conclude that as a result of the search which was underway, and which would have been continued, the body of Pamela Powers would have been found even in the absence of assistance by defendant. Further, that body would have been found in essentially the same condition it was in at the time of the actual discovery, so that all of the evidence which it actually yielded would have been available to the police.

Under the evidence adduced in this case, the State established by a preponderance of the evidence the manner and the time in which the discovery of Pamela Powers's body would have occurred. Trial court was correct in refusing to suppress evidence regarding the victim's body.

III. *Refusal to suppress evidence from car.* Defendant's next contention is that trial court erred in refusing to suppress evidence obtained in a search of the car which he used to transport himself to Davenport. His contention is that the search was improper because the magistrate who issued the search warrant did not endorse on the application the name of

the police officer who appeared and gave sworn testimony in support of the warrant, and did not include an abstract of that officers' testimony.

The parties are agreed that the affidavit which accompanied the application for search warrant was insufficient because it contained nothing except conclusory allegations. And the parties agree that the information which the police officer testified at the suppression hearing that he had given to the issuing magistrate in his sworn statement would have provided probable cause for issuance of the warrant.

[21] The issue, then, is whether the court hearing the motion to suppress could properly consider the oral testimony given to the magistrate, or if consideration of that testimony was foreclosed by the magistrate's failure to make an abstract of the oral statement.

The statutory provision which made such an abstract a requirement when oral testimony was relied upon to issue a warrant, an amendment to section 751.4, The Code 1966 (current version at § 808.3, The Code 1979), did not take effect until six months after the warrant in question was issued. But defendant contends that *State* v. *Spier,* 173 N.W.2d 854, 862 (Iowa 1970), relying upon *State* v. *Lampson,* 260 Iowa 806, 149 N.W.2d 116 (1967), made such an abstract a requirement prior to the effective date of the amendment to section 751.4, including the period during which the present warrant was issued. We reject this contention because *State* v. *Spier* was decided upon a lack of probable cause for the issuance of the search warrant. It did not turn upon whether oral testimony was endorsed on the warrant application. Nor did it rely upon *State* v. *Lampson* for the endorsement requirement.

Spier and *Lampson* both dealt with what is required to show probable cause when the police officer applying for the warrant is relying upon an informant. In *Lampson* the applying officer presented the magistrate with an oral statement which was

essential to the warrant's issuance. 260 Iowa at 808-09, 812, 149 N.W.2d at 117, 119. There is no indication in the opinion that the magistrate abstracted that statement. Certainly, that was not an issue in the case.

In *Spier*, this court relied upon *Lampson* for the proposition that a warrant may be issued on sworn testimony taken by the magistrate. 173 N.W.2d at 862. But *Spier* then went beyond *Lampson* to state a requirement that the magistrate make a written abstract of such testimony, and, if an informant is being relied upon, an abstract of the information showing that informant's reliability. This language, which served as a prelude to the holding that an abstract was required, clearly demonstrates that this court understood that the abstracting requirement was an addition to those of *Lampson*: "While reaffirming our stand in *Lampson, supra,* it is to us *now* apparent . . .." (Emphasis added.)

No decision of this court has held the abstracting requirements of *Spier* to apply to a case which arose before the effective date of the amendment to section 751.4. Although the facts in *Spier* arose prior to that amendment, the standards which *Spier* sets out appear, in fact, to be *dicta* provided for the guidance of persons who would be required to operate under the requirements of the amendment to section 751.4. No other justification for the standard exists. No such requirement is imposed by the Constitution. *Campbell* v. *Minnesota,* 487 F.2d 1, 5 (8th Cir. 1973); *United States* v. *Berkus,* 428 F.2d 1148, 1152 (8th Cir. 1970). Because the statute upon which the *Spier* standard was based did not take effect until six months after the warrant in question was issued, defendant's contention is without merit.

[22] However, even if we were to assume that the *Spier* standard had some basis independent of the statute, we would decline to apply the holding of that case retroactively. The reliance of police officers on the state of the law as it stood in

December 1968 was reasonable, and such a retroactive application would have a seriously derogatory effect on the administration of justice. *See Johnson* v. *New Jersey*, 384 U.S. 719, 727, 86 S.Ct. 1772, 1777-78, 16 L.Ed.2d 882, 888 (1966). Trial court's refusal to suppress evidence gained in the search of defendant's car was proper.

IV. *Publicity during trial.* The fourth division of defendant's brief raises two separate but related points. Both focus on the claim that the jury was exposed to publicity about the case during the trial.

A. The first point is an assertion that trial court committed error by refusing to sequester the jury during the entire trial, or, alternatively during its deliberations.

The defense made a motion well in advance of trial which recited that the case had been the subject of a great deal of publicity. It therefore requested three items of relief: change of venue, individual voir dire examinations of each potential juror, and sequestration of the jurors "from the point of selection forward." Trial court granted a change of venue and individual voir dire, but subsequently refused to sequester the jury. The court recited three reasons for that refusal. First, voir dire, and particularly individual voir dire, would enable the parties to select an impartial jury. Then, recognizing that sequestration of the jury during trial would be for the purpose of shielding it from publicity during the trial, the court opined that a jury which was impartial initially could be expected to remain so throughout the trial. Second, the trial was anticipated to run for as long as two weeks. That length of isolation "would reduce drastically the number of people who [could] fairly be expected to serve . . .." Third, the court expressed concern and reservations about the potential effect of extended isolation on jurors and their ability to maintain their "common sense of balance," which is essential to the jury system.

At the end of the first day during which evidence was presented, trial court denied, "at this stage in the record," another motion, in which defendant requested that the jury be sequestered during its deliberations. The court expressed the view that voir dire had shown that the jurors appeared to have minds of their own on the case, that they appeared to be resolved to try the case on the evidence, and that there was no indication that they would violate their oaths.

Finally, during a recess near the end of defendant's presentation of his case, defendant again moved for sequestration during deliberations. In support, defense counsel recited the fact that newspapers in both Cedar Rapids and Des Moines had published the names of the jurors, in spite of a request by trial court that the list not be published. In addition, two wire services had carried the jury list. On that basis, the defense argued that the possibility of jurors' being improperly contacted was greatly increased.

The State, for the first time, opposed the motion to sequester. In answer to defendant's latter contention, it argued that because the jury was in public view while hearing the case, it had already been exposed to persons who were inclined to contact them. Additionally, the State argued that sequestration was for the distinct purpose of keeping jurors from seeing publicity about the case.

Trial court again denied the request. The court reminded counsel that in admonishing the jurors it had instructed them to report any improper attempts at contacting them. It also held open the possibility of making special inquiry of the jury as to whether any such contact had occurred.

On appeal, defendant contends that these three rulings by the trial court denied him the fair trial which he is guaranteed by the Federal Constitution. He places primary reliance on *Sheppard* v. *Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). Reliance upon *Sheppard* at this stage in the proceedings is misplaced, however.

In *Sheppard,* the Supreme Court ordered that a writ of habeas corpus issue in favor of an Ohio state prisoner whose trial had been permeated by overreaching on the part of the press. That writ issued after a federal district court had held an evidentiary hearing which had produced five volumes of clippings from newspapers which had covered the case from the time of the crime through the trial to the time of conviction. *Sheppard* v. *Maxwell,* 231 F.Supp. 37, 44, 72 (S.D.Ohio 1964), *rev'd,* 346 F.2d 707 (6th Cir. 1965), *rev'd,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), *noted in id.* at 342, 86 S.Ct. at 1512, 16 L.Ed.2d at 608. In short, the Court had a full record upon which to base its conclusion that Sheppard had been denied a fair trial. In contrast to that full record, here we have nothing on which to base a judgment on such an issue.

We do not point up this difference to find fault in defendant's failure to produce such a record, at least with regard to the first motion. Obviously, the publicity from which a motion to sequester is designed to shelter the jury is publicity which occurs during trial. And, at the time of the first motion, defendant could not show such publicity without seeing into the future. The same is likely true of the second motion, because it was made so early in the trial process, and because it still had a view to the future: the deliberation period. But an evidentiary showing regarding publicity which had occurred during trial could have been made in conjunction with the third motion, and might have had some relevance regarding the likelihood of continued publicity during deliberations. Such a showing was never made.

Another way in which this csae differs from *Sheppard* is that the Ohio trial court which originally tried Sheppard refused repeated motions for change of venue. 384 U.S. at 354 n.9, 86 S.Ct. at 1518, 16 L.Ed.2d at 615. This remedy for the effects of pre-trial publicity was granted here, although defendant later takes issue with the manner in which it was done.

For these reasons, we are not here confronted with the fair trial constitutional issue which defendant attempts to argue. Certainly, we are in no position to make an independent evaluation of the totality of the circumstances which *Sheppard* would require, 384 U.S. at 352, 362, 86 S.Ct. at 1517, 1522, 16 L.Ed.2d at 614, 620, and which defendant insists is appropriate. *See also State* v. *Jacoby*, 260 N.W.2d 828, 834 (Iowa 1977).

Instead, we can only review trial court's refusals to sequester the jury for an abuse of discretion. *State* v. *Lowder*, 256 Iowa 853, 864, 129 N.E.2d 11, 18 (1964), *cert. denied*, 380 U.S. 965, 85 S.Ct. 1110, 14 L.Ed.2d 155 (1965); § 780.19, The Code 1977 (current version at Iowa R.Crim.P. 18(5)(h)); *Dunahoo, The Scope of Judicial Discretion in the Iowa Criminal Law Process*, 58 Iowa L.Rev. 1023, 1066-67 (1973); *see State* v. *Johnson*, 216 N.W.2d 337, 339 (Iowa 1974); *cf. United States* v. *Carter*, 602 F.2d 799, 805 (7th Cir. 1979) (noting that most of the circuits allow the district court to permit separation of deliberating jury in the exercise of its discretion). Defendant argues in this regard that trial court gave only one reason for declining to sequester the jurors, and that the reason given was invalid as a matter of law, thus requiring a reversal. *See Farley* v. *Glanton*, 280 N.W.2d 411, 415 n.2 (Iowa 1979) (exercise of discretion based upon erroneous view of the law is error).

The contention is that trial court acted solely on the basis of avoiding inconvenience to jurors, and that this consideration was rejected in *Des Moines Register & Tribune* v. *Osmundson*, 248 N.W.2d 493, 500 (Iowa 1976). The argument has no merit for two reasons.

First, as our recitation of the facts shows, trial court listed several sound reasons for denying the motions.

[23] Second, and more important, the trial judge did not base his judgment on a consideration of juror convenience such as that referred to in *Osmundson*. Defendant's characterization of

trial court's comment that between one and two weeks of sequestration "would reduce drastically the number of people who can fairly be expected to serve . . ." as a reference to juror convenience is simply erroneous.

Trial courts have the discretion to excuse any juror for proper cause. *State* v. *Critelli*, 237 Iowa 1271, 1279-81, 24 N.W.2d 113, 117-18 (1947); § 607.3, The Code 1977. During voir dire, trial court's disposition of requests by veniremen that they be excused demonstrated that the court was not inclined to grant such excuses lightly. Reading the court's statement of reasons for denying the motion to sequester in the light of the court's later conduct at voir dire leads us to conclude that trial court feared that a substantially greater number of persons could demonstrate that they would be "materially injured," *see* § 607.3, by sequestration than by the time requirements of attending the trial itself and the subsequent deliberations.

No abuse of discretion was shown at this juncture.

B. Defendant also complains in this division because trial court denied defendant's motion in arrest of judgment without a hearing. That motion raised the constitutional fair trial issue which has been alluded to immediately above, and sought an evidentiary hearing on the matter. We do not consider the propriety of trial court's ruling or the failure to hold a hearing because that court's jurisdiction was extinguished before the ruling was issued.

The motion in arrest of judgment was filed on October 14, 1977. Three days later, on the 17th, defendant filed his notice of appeal. Trial court did not rule on the motion until October 24. Defendant subsequently filed a notice of appeal from the ruling on the motion in arrest on November 23, 1977.

[24,25] When defendant filed his notice of appeal on October 17 he cut off the jurisdiction of the district court to do anything except enforce the sentence if bail was not put in. *Cleesen* v.

Brewer, 201 N.W.2d 474, 476 (Iowa 1972). Although a ruling on a motion in arrest of judgment is appealable under some circumstances, *State* v. *Hellickson*, 162 N.W.2d 390, 393 (Iowa 1968), that rule applies only when trial court adjudicates the motion while it still has jurisdiction.

This case is different from *State* v. *Gatewood*, 179 N.W.2d 520 (Iowa 1970). In that case, this court reviewed a ruling on a motion in arrest of judgment which was filed after the notice of appeal because trial court had conducted a hearing on the motion and the merits of the issue could be litigated in any event in post-conviction relief proceedings. Here, of course, no hearing has been conducted. Thus nothing is to be gained by attempting to consider the matter in its present posture.

V. *Denial of motion for public opinion polls for use in selection of venue.* The fifth complaint which Williams makes is that he was denied effective assistance of counsel, due process and equal protection because trial court denied his request for funds to conduct public opinion polls in five Iowa counties other than Polk County. Those polls were to be for the purpose of selecting proper venue after trial court granted a change of venue.

[26] Defendant, however, overstates the problem. The question is whether trial court denied him the means to avoid being tried in a county where, because of the dissemination of potentially prejudicial material, there was a reasonable likelihood that he could not receive a fair trial. *Pollard* v. *District Court*, 200 N.W.2d 519, 520 (Iowa 1972) (quoting ABA Project on Standards for Criminal Justice, Fair Trial and Free Press § 3.2(c) (Approved Draft 1968). Trial court did not so hinder him.

In fact, trial court granted a change of venue from Polk County to Linn County on the basis of potentially prejudicial publicity. If the same atmosphere had been shown to prevail in Linn County, it was open to defendant to petition for a second change of venue. *State* v. *Minski*, 7 Iowa 336 (1858). *See also* ABA Project on Standards for Criminal Justice, Fair Trial and

Free Press § 3.2(e) (Approved Draft 1968). While *Minski* engaged in statutory construction, its rationale applies to sections 778.1-.10, The Code 1977 (current version at Iowa R.Crim.P. 10.2(f), .9(b). Section 778.5 was not to the contrary.

This complaint is without merit.

VI *Denial of defendant's challenge for cause of prospective juror.* In this assignment, Williams insists that trial court erred by refusing to dismiss a juror who, defendant claims, showed she could not try the cause impartially. Defendant removed the prospective juror by use of his fourth peremptory challenges were exercised.

[27-30] We cannot base reversal on this assignment because the challenge was not sufficient to preserve any error. It did not specify the grounds upon which it was based. The full substance of it was: "we would challenge for cause. . . ." Under similar circumstances, this court held in *State* v. *Anderson,* 239 Iowa 1118, 1121-22, 33 N.W.2d 1, 3-4 (1948), that such a general statement did not entitle defendant to review of the question. This is in accord with the opening language of section 779.5, The Code 1977 (presently in Iowa R.Crim.P. 17(5)) ("A challenge for cause . . . must distinctly specify the facts constituting the causes thereof."), and a long line of case law. *See, e. g., Payne* v. *Waterloo, C. F. & N. Ry.,* 153 Iowa 445, 450, 133 N.W. 781, 783 (1911) (inference to be drawn from nature of examination of juror is not sufficient to preserve specific ground); *State* v. *Munchrath,* 78 Iowa 268, 270-71, 43 N.W. 211, 212 (1889). The failure to specify the cause prevents appellate consideration of both constitutional and statutory arguments. *State* v. *Jacoby,* 260 N.W.2d 828, 834 (Iowa 1977).

Even if the issue had been preserved, however, it is doubtful that reversal would have been mandated. Three principles govern our review of such questions. First, trial court is vested with broad, but not unlimited, discretion in ruling upon a challenge for cause. *State* v. *Winfrey,* 221 N.W.2d 269, 273

(Iowa 1974); *State* v. *Beckwith,* 242 Iowa 228, 232, 46 N.W.2d 20, 23 (1951); Dunahoo, *supra* at 1064-65. Second, a determination of a propsective juror's qualifications must rest upon the entire record of the examination. *See State* v. *Beckwith,* 242 Iowa at 238, 46 N.W.2d at 26. Third, the trial court sits as judge of the facts on the question of existence of a ground for challenge. *Tobin, Tobin & Tobin* v. *Budd,* 217 Iowa 904, 919, 251 N.W. 720, 727 (1934). Appllication of these principles to the ruling now questioned would not have been likely to lead to reversal. Trail court warned defense counsel that the use of leading questions in examining the prospective juror was minimizing the value of her answers. The court evidently believed that counsel, both for the State and for the defense, had confused her, and that defense counsel was leading her into the appearance of being disqualified. That finding has some support in the record.

This in no way marks a retreat from the position enunciated in *State* v. *Beckwith,* 242 Iowa at 238-39, 46 N.W.2d at 26. We reiterate that there is no need for close rulings on the qualifications of jurors in criminal cases. "[T]rial courts should use the utmost caution in overruling challneges for cause in criminal cases when there appears to be a fair question as to their soundness." *Id.* at 238, 46 N.W.2d at 26. *See also* Dunahoo, *supra* at 1065.

The contention considered here, however, does not require reversal.

VII. *Denial of defendant's motion for directed verdict on issues of premeditation and deliberation.* Defendant aruges that there was not sufficient evidence to submit the issues of premeditation and deliberation, two of the elements which distinguish first degree murder from second degree murder. Our reivew of this issue is governed by *State* v. *Overstreet,* 243 N.W.2d 880, 883-84 (Iowa 1976), except that, as appellate counsel for defendant concede, circumstantial evidence is con-

sidered in light of the revised standard of *State* v. *O'Connell*, 275 N.W.2d 197, 204-05 (Iowa 1979). *State* v. *Hillsman*, 281 N.W.2d 114, 115 (Iowa 1979).

[31] "To deliberate is to weigh in one's mind or to consider. To premeditate is to think or ponder upon a matter before action. Webster's International Dictionary." *State* v. *Fryer*, 226 N.W.2d 36, 41 (Iowa 1975). *See also* W. LaFave & A. Scott, *Handbook on Criminal Law* § 73, at 563 (1972) ("Perhaps the best that can be said of 'deliberation' is that it requires a cool mind that is capable of reflection, and of 'premeditation' that it requires that the one with the cool mind did in fact reflect, at least for a short period of time before his act of killing."). However, these elements need not exist for any particular length of time. *State* v. *Gilroy*, 199 N.W.2d 63, 66 (Iowa 1972).

[32-35] Premeditation and deliberation may not be presumed, *State* v. *Fryer*, 226 N.W.2d at 41, but because they are mental elements they may be shown by circumstantial evidence. *State* v. *Lass*, 228 N.W.2d 758, 766 (Iowa 1975); *State* v. *Christie*, 243 Iowa 1199, 1207, 53 N.W.2d 887, 891, *modified*, 54 N.W.2d 927 (1952); 40 C.J.S. *Homicide* § 192, at 1092 (1944). They may not be inferred from intent. *State* v. *Phillips*, 118 Iowa 660, 677, 92 N.W. 876, 881-82 (1902). And the mere opportunity to premeditate and deliberate is not enough. *State* v. *Wilson*, 234 Iowa 60, 94, 11 N.W.2d 737, 754 (1943) ("The question is not only, Did the accused have time to think, but did he think?"). Because premeditation and deliberation are elements of first degree murder, the State must prove them beyond a reasonable doubt. *Mullaney* v. *Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

When the State must rely upon circumstantial evidence of premeditation and deliberation, one or more of three categories of evidence frequently are used: "(1) evidence of planning activity of the defendant which was directed toward the killing; (2) evidence of motive which might be inferred from prior relation-

ships between defendant and the victim; and (3) evidence regarding the nature of the killing." *State* v. *Harrington,* 284 N.W.2d 244, 248 (Iowa 1979) (citing *People* v. *Anderson,* 70 Cal.2d 15, 26-27, 73 Cal.Rptr. 550, 557, 447 P.2d 942, 949 (1968) (en banc); W. LaFave & A. Scott, *supra* § 73, at 564). Adequate evidence to support both submission of the issue and a subsequent conviction might come either solely from one category or from more than one. *Harrington,* 284 N.W.2d at 248.

The evidence at trial established that the victim had been sexually molested at the time of, or immediately after, her death. It also indicated that her death was caused by "lack of oxygen and anoxia, probably induced by some smothering mechanism." In the opinion of the medical examiner, the suffocation was caused by external means, something which covered the victim's mouth and nose.

[36] Taking the evidence in the light most favorable to the State and drawing all fair inferences in favor of the jury's action, there was substantial evidence regarding the nature of the killing to justify submission to the jury of the issues of premeditation and deliberation. That panel would have been justified in concluding from the evidence that defendant apprehended Pamela Powers for the preconceived purpose of sexually molesting her, and that her death was a part of that coolly considered plan.

No error occurred here.

VIII. *Instructing on a theory which was not charged in the indictment.* Defendant was charged by an indictment which accused him "of the crime of murder as defined in Sections 690.1 and 690.2 of the 1966 Code of Iowa [in] that [defendant] . . . did with malice aforethought, premeditation, deliberation and intent to kill, murder Pamela Powers in Polk County, Iowa." He alleges that submission to the jury of a felony murder instruction containing the issue of whether Pamela Powers was killed

in the perpetration of an attempted rape was a violation of his statutory and constitutional rights to be tried only on the offenses charged in the indictment.

[37,38] Defendant first called this claimed error to trial court's attention in his motion for a new trial. An objection to an instruction may be urged in a motion for a new trial unless it has been expressly waived. *State* v. *Willis,* 250 N.W.2d 428, 430 (Iowa 1977) ("These are the only two objections to the instructions, Your Honor, that I did have," held to be such a waiver.). Here defendant did exactly that. First, defendant's objection to the felony murder instruction was founded only upon the ground of insufficient evidence to support submission of the issue; the objection did not question the propriety of submitting the issue under the indictment. Then, after dictating his objections, counsel stated: "I think with the exception of our proposed instructions, Your Honor, that's all we have with regard to any objections and exceptions to your proposed instructions." Thus, the error now urged was waived. *Id.* Defendant's assertion, first raised on appeal, that this claimed error deprived him of due process will not avail him. "This court does not address issues, even of constitutional magnitude, not presented to the district court." *Estabrook* v. *Iowa Civil Rights Commission,* 283 N.W.2d 306, 311 (Iowa 1979).

[39,40] In addition, we note that the federal constitutional argument which defendant makes in his initial brief is without merit. He there relies upon *Stirone* v. *United States,* 361 U.s. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). But *Stirone* was based upon the fifth amendment guarantee aginst being held to answer for a federal felony "unless on a presentment or indictment of a Grand Jury." That provision of the Bill of Rights does not apply against the states. *Hurtado* v. *California,* 110 U.S. 516, 4 S.Ct. 111; 28 L.Ed. 232 (1884). And federal grand jury requirements are not imposed on states that choose to adopt grand jury systems. *Alexander* v. *Louisiana,* 405 U.S. 625, 633, 92 S.CT. 1221, 1226-27, 31 L.Ed.2 330, 337 (6th Cir.

1977). But *see Carter* v. *Jury Commission,* 396 U.S. 320, 330, 90 S.Ct. 518, 523-24, 24 L.Ed.2d 549, 557-58 (1970) (racial or national composition subject to federal scrutiny).

IX. *Instruction allowing jury to find defendant guilty of first degree murder without reaching agreement as to the precise nature of his acts.* Defendant next contends that the instruction defining first degree murder allowed the jury to convict him of that crime without necessarily reaching agreement as to what acts he performed to commit it. The instruction provided in pertinent part as follows:

> Before the Defendant can be found guilty of such crime, the State must prove each of the following propositions:
>
> A. That on or about December 24, 1968, in Polk County, Iowa, the defendant did wilfully and unlawfully kill Pamela Powers.
>
> B. That such action on the part of the Defendant was done with malice aforethought.
>
> C. That such action of the Defendant was done with deliberation, premeditation and with a specific intent to kill Pamela Powers; or,
>
> Was done in the perpetration of the crime of Attempted Rape.

Stated in another way, defendant argues that because subparagraph C allows alternative theories, six jurors could have found that he killed Pamela Powers with deliberation, premeditation and specific intent to kill, while the other six could have rejected that hypothesis and found that it was done in the perpetration of an attempted rape. While he admits he has no federal constitutional right to a unanimous jury in a state criminal prosecution, *see Apodaca* v. *Oregon,* 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); *Johnson* v. *Louisiana,* 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), he contends that he is entitled to a more stringent standard than one allowing a six to six split.

The State points out, and defendant concedes, that this issue was not presented to trial court. Defendant argues, nevertheless, that trial court had the duty to instruct fully and fairly on all the issues, even without request, and that this court must review for a fair trial, regardless of whether an issue was preserved.

[41] Defendant's contentions for review without preservation were considered and rejected in *State* v. *Sallis*, 262 N.W.2d 240, 248 (1978). Because this issue was not raised in the trial court, it cannot be effectively asserted here.

[42-44] Even if we were to reach defendant's contention, however, we would not be inclined to agree with it. He relies upon *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977). In that case, Gipson was charged with a violation of 18 U.S.C. § 2313, which prohibits the sale or receipt of stolen motor vehicles and aircraft. The trial court's instructions permitted the jury to find Gipson guilty if each individual juror found that he performed one of six prohibited acts—receiving, concealing, storing, bartering, selling or disposing—on a vehicle. 553 F.2d at 458. The court of appeals found that these six acts fell into two groups. The first three acts constituted one group, while the last three constituted the second. Within each group, the three listed acts were considered by the court of appeals to be "sufficiently analogous to permit a jury finding of the *actus reus* element of the offense to be deemed 'unanimous' despite differences among the jurors as to which of the intragroup acts the defendant committed." *Id.*

Assuming that we should apply the *Gipson* standard to the instruction complained of here, no infirmity has been shown to exist. First, *Gipson* focused on the *actus reus* element of the offense. The instruction complained of here allows alternative juror findings not on the *actus reus*, but on the mental elements of the crime of first degree murder. This is because felony murder is simply a specific method set apart by the legislature by

which the prosecution may show that defendant was acting with the evil state of mind which is necessary to support a finding of first degree murder. *State* v. *Wilson*, 220 Kan. 341, 344-45, 552 P.2d 931, 935-36 (1976); *People* v. *Jackson*, 20 N.Y.2d 440, 450, 285 N.Y.S.2d 8, 17-18, 231 N.E.2d 722, 729-30 (1967), *cert. denied*, 391 U.S. 928, 88 S.Ct. 1815, 20 L.Ed.2d 668 (1968). Thus the *actus reus*, which is what *Gipson* focused on, is identical for either type of first degree murder. That is, the jury, under either theory, had to find that defendant killed Pamela Powers.

Second, assuming that the *Gipson* standard might be taken beyond the *actus reus* to apply to mental elements, the mental elements here are sufficiently analogous to meet the *Gipson* standard. Under section 690.2, The Code 1966 (current version at § 707.2, The Code 1979), it was necessary for the State to show that defendant committed murder in the perpetration of a felony. The mere showing of a killing was insufficient. *State* v. *Conner*, 241 N.W.2d 447, 463 (Iowa 1976). Thus, malice aforethought is a required element of felony murder as well as of the type of first degree murder which must be deliberate and premeditated. *State* v. *Galloway*, 275 N.W.2d 736, 737-38 (Iowa 1979). And, as demonstrated above, a showing that the murder occurred in the perpetration of a felony is merely a particular statutorily prescribed method for showing the mental elements of deliberation and premeditation.

Several other state courts have reached this same result. *See People* v. *Chavez*, 37 Cal.2d 656, 670-72, 234 P.2d 632, 641-42 (1951) (en banc); *State* v. *Souhrada*, 122 Mont. 377, 384-85, 204 P.2d 792, 796 (1949); *People* v. *Sullivan*, 173 N.Y. 122, 127-30, 65 N.E. 989, 990 (1903). *People* v. *Olsson*, 56 Mich.App. 500, 224 N.W.2d 691 (1974), cited by defendant in support of his position, is simply not persuasive.

Reversal cannot be predicated on this ground.

X. *Ineffective assistance of counsel.* Defendant claims that his trial counsel were ineffective in two respects: because they advised him not to testify in his own behalf, and because they failed to introduce the testimony of a witness which he claims supported his theory of the case. Our disposition of his claims only requires that we explain them briefly.

Defendant's factual theory was that Pamela Powers had been molested and murdered by another person. That other person left her body in defendant's room, where defendant found it. Fearful of being accused of the murder, defendant carried the body out of the YMCA and hid it in the ditch where it was found two days later.

Defendant now argues that for that theory to be believable, he should have testifed in his own behalf. To remove the decision from the realm of trial tactics, defendant contends that the reasons which trial counsel gave for recommending that defendant not testify, which were made a part of the record, were inadequate as a matter of law. He also complains that the testimony of a witness which was available in deposition form and which he contends supports his factual theory of the case was not introduced at trial.

[45] Recently, we have been extremely reluctant to adjudicate claims of ineffective assistance on direct appeals. This reluctance has been due to the lack of full development of the facts surrounding the representation complained of. There has been increasing concern that the State and the attorneys whose effectiveness is being attacked should have an opportunity to rebut allegations of ineffectiveness. *See State* v. *Smith,* 282 N.W.2d 138, 143-44 (Iowa 1979); *State* v. *O'Connell,* 275 N.W.2d 197, 205-06 (Iowa 1979); *State* v. *Coil,* 264 N.W.2d 293, 296 (Iowa 1978). *See also State* v. *Barber,* 301 So.2d 7, 9 (Fla.1974); *State* v. *Bosler,* 432 S.W.2d237, 239 (Mo.1968); *Commonwealth* v. *Wade,* 480 Pa. 160, 172-74, 389 A.2d 560, 566-67 (1978)(remand from direct appeal ordered for evidentiary hearing on in-

effective assistance). We therefore decline to consider whether defendant's counsel were ineffective. His right to raise that issue by postconviction proceedings, ch. 663A, The Code, is reserved.

XI. *The Polk County Medical Examiner's change of opinion.* In his final assignment of error, defendant argues that trial court should have held an evidentiary hearing on his motion in arrest of judgment. That motion alleged, in the division relevant here, that Dr. R. C. Wooters, the Polk County Medical Examiner, changed his medical opinion on a subject which was critical to the defendant only shortly before defendant was to call him to testify. This, in defendant's opinion, denied him a fair trial.

[46] We, however, do not reach the issue. This is another division of the motion in arrest of judgment discussed above, in division IV B. As explained there, trial court's jurisdiciton was terminated before it ruled on this motion. Thus we have nothing to review.

We have considered all of the issues presented for review, whether specifically discussed or not, and none warrants a reversal. Defendant's conviction stands affirmed.

AFFIRMED.

All Justices concur except HARRIS, J., who concurs in result.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 80-450-D

Robert Anthony Williams,
Petitioner,

v.

Crispus Nix, Warden, Iowa State Penitentiary, and
Attorney General of the State of Iowa,
Respondents.

Memorandum Opinion and
Order Denying Writ of Habeas Corpus

This is a habeas corpus proceeding under 28 U.S.C. § 2254 brought by an inmate of the Iowa State Penitentiary at Fort Madison, Iowa, where respondent Crispus Nix is the warden.[1] Petitioner is serving a sentence of life in prison imposed on August 19, 1977, by Iowa District Court Judge J. P. Denato after petitioner was found guilty by a jury of first degree murder. The conviction was affirmed by the Iowa Supreme Court. *State* v. *Williams*, 285 N.W.2d 248 (Iowa 1979).

The court heard evidence and oral arguments, and the case is now fully submitted for decision upon the record, including transcripts of proceedings in state court, affidavits submitted by the parties, evidence received by this court, and the briefs and oral arguments of counsel.

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[1] Since this action was commenced, named defendant David Scurr ceased serving as warden of the Iowa State Penitentiary and he has been replaced by Crispus Nix, who is automatically substituted as party defendant under the provisions of Fed. R. Civ. P. 25(d)(1).

FIRST CONVICTION VACATED

The conviction under review is the petitioner's second conviction for the same offense. His first conviction was, after first being affirmed by the Iowa Supreme Court, *State* v. *Williams*, 182 N.W.2d 396 (Iowa 1971), vacated in a federal habeas corpus proceeding. *Williams* v. *Brewer*, 375 F. Supp. 170 (S.D. Iowa), *aff'd*, 509 F.2d 227 (8th Cir. 1974), *aff'd sub nom.*, *Brewer* v. *Williams*, 430 U.S. 387 (1977). The United States Supreme Court held that petitioner's constitutional right to counsel had been violated by a Des Moines police detective shortly after his arrest and that certain evidence obtained as a result of that violation had been wrongfully admitted into evidence at his trial.

USE OF INEVITABLE DISCOVERY DOCTRINE

Petitioner asserts that admission of evidence of discovery of the victim's body and other evidence resulting from that discovery violated his Fifth Amendment right not to incriminate himself and his Sixth Amendment right to counsel, both applicable to states through the Fourteenth Amendment, under the "fruit of the poisonous tree doctrine." This contention requires a review of some facts and the holdings of the federal courts in the first habeas corpus proceeding. The facts are well recited in the United States Supreme Court opinion in *Brewer* v. *Williams*, *supra*, 430 U.S. at 390-93:

> On the afternoon of December 24, 1968, a 10-year-old girl named Pamela Powers went with her family to the YMCA in Des Moines, Iowa, to watch a wrestling tournament in which her brother was participating. When she failed to return from a trip to the washroom, a search for her began. The search was unsuccessful.
>
> Robert Williams, who had recently escaped from a mental hospital, was a resident of the YMCA. Soon after the girl's disappaerance Williams was seen in the YMCA lobby

carrying some clothing and a large bundle wrapped in a blanket. He obtained help from a 14-year-old boy in opening the street door of the YMCA and the door to his automobile parked outside. When Williams placed the bundle in the front seat of his car the boy "saw two legs in it and they were skinny and white." Before anyone could see what was in the bundle Williams drove away. His abandoned car was found the following day in Davenport, Iowa, roughly 160 miles east of Des Moines. A warrant was then issued in Des Moines for his arrest on a charge of abduction.

On the morning of December 26, a Des Moines lawyer named Henry McKnight went to the Des Moines police station and informed the officers present that he had just received a long-distance call from Williams, and that he had advised Williams to turn himself in to the Davenport police. Williams did surrender that morning to the police in Davenport, and they booked him on the charge specified in the arrest warrant and gave him the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436. The Davenport police then telephoned their counterparts in Des Moines to inform them that Williams had surrendered. McKnight, the lawyer, was still at the Des Moines police headquarters, and Williams conversed with McKnight on the telephone. In the presence of the Des Moines chief of police and a police detective named Leaming, McKnight advised Williams that Des Moines police officers would be driving to Davenport to pick him up, that the officers would not interrogate him or mistreat him, and that Williams was not to talk to the officers about Pamela Powers until after consulting with McKnight upon his return to Des Moines. As a result of these conversations, it was agreed between McKnight and the Des Moines police officials that Detective Leaming and a fellow officer would drive to Davenport to pick up Williams, that they would bring him directly back to Des Moines, and that they would not question him during the trip.

In the meantime Williams was arraigned before a judge in Davenport on the outstanding arrest warrant. The judge advised him of his *Miranda* rights and committed him to jail. Before leaving the courtroom, Williams conferred with a lawyer named Kelly, who advised him not to make any statements until consulting with McKnight back in Des Moines.

Detective Leaming and his fellow officer arrived in Davenport about noon to pick up Williams and return him to Des Moines. Soon after their arrival they met with Williams and Kelly, who, they understood, was acting as Williams' lawyer. Detective Leaming repeated the *Miranda* warnings, and told Williams:

> "[W]e both know that you're being represented here by Mr. Kelly and you're being represented by Mr. McKnight in Des Moines, and . . . I want you to remember this because we'll be visiting between here and Des Moines."

Williams then conferred with Kelly alone, and after this conference Kelly reiterated to Detective Leaming that Williams was not to be questioned about the disappearance of Pamela Powers until after he had consulted with McKnight back in Des Moines. When Leaming expressed some reservations, Kelly firmly stated that the agreement with McKnight was to be carried out—that there was to be no interrogation of Williams during the automobile journey to Des Moines. Kelly was denied permission to ride in the police car back to Des Moines with Williams and the two officers.

The two detectives, with Williams in their charge, then set out on the 160-mile drive. At no time during the trip did Williams express a willingness to be interrogated in the absence of an attorney. Instead, he stated several times that "[w]hen I get to Des Moines and see Mr. McKnight, I

am going to tell you the whole story." Detective Leaming knew that Williams was a former mental patient, and knew also that he was deeply religious.

The two detective and his prisoner soon embarked on a wideranging conversation covering a variety of topics, including the subject of religion. Then, not long after leaving Davenport and reaching the interstate highway, Detective Leaming delivered what has been referred to in the briefs and oral arguments as the "Christian burial speech." Addressing Williams as "Reverend," the detective said:

> "I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

Williams asked Detective Leaming why he thought their route to Des Moines would be taking them past the girl's body, and Leaming responded that he knew the body was in the area of Mitchellville—a town they would be passing

on the way to Des Moines.[1] Leaming then stated: "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road."

As the car approached Grinnell, a town approximately 100 miles west of Davenport, Williams asked whether the police had found the victim's shoes. When Detective Leaming replied that he was unsure, Williams directed the officers to a service station where he said he had left the shoes; a search for them proved unsuccessful. As they continued towards Des Moines, Williams asked whether the police had found the blanket, and directed the officers to a rest area where he said he had disposed of the blanket. Nothing was found. The car continued towards Des Moines, and as it approached Mitchellville, Williams said that he would show the officers where the body was. He then directed the police to the body of Pamela Powers.

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[1] The fact of the matter, of course, was that Detective Leaming possessed no such knowledge.

At the first trial, Judge Denato denied petitioner's motion to suppress all evidence relating to or resulting from any statements petitioner made during the trip from Davenport to Des Moines on the ground that petitioner had waived his right to have an attorney present when he made the statements to Detective Leaming. *Id.* at 394. A bare majority of the Iowa Supreme Court justices agreed with Judge Denato. *State* v. *Williams, supra,* 182 N.W.2d. Judge Hanson of the United States District Court disagreed and held that the incriminating statements were wrongfully admitted. He based his conclusion on three separate grounds: (1) denial of assistance of counsel; (2) denial of rights under *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), and *Miranda* v. *Arizona,* 384 U.S. 436 (1966); and (3) involuntariness of the statements. *Williams* v. *Brewer, supra.* The court of appeals affirmed, 2-1, on the basis of Judge Hanson's

first and second grounds, but did not address the involuntariness ground. *Williams* v. *Brewer, supra.* The United States Supreme Court affirmed, 5-4, on the ground that petitioner was denied the assistance of counsel, but did not address the other two grounds. *Brewer* v. *Williams, supra.* All three federal courts found that petitioner had not waived his right to counsel.

On retrial, petitioner's counsel moved to suppress evidence of the discovery of the victim's body and other evidence resulting from that discovery on the ground that such evidence was fruit of the poisonous tree. After an evidentiary hearing, Judge Denato denied the motion based on his finding that searchers, who were systematically searching for the body, would have soon discovered it even if petitioner had not made the statements to Detective Leaming and had not led the police to the body, and the evidence was admitted at the trial.[2] The Iowa Supreme Court, on a de novo review of the evidence,[3] also found that the body would have been discovered anyway. *State* v. *Williams, supra,* 285 N.W.2d at 262.

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[2] Of course, petitioner's statements to Detective Leaming and the fact that he led the police to the body were not placed in evidence. In a footnote to its opinion, the United States Supreme Court had stated:

> While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams. Cf. *Killough* v. *United States,* 119 U.S. App.D. C. 10, 336 F.2d 929. In the event that a retrial is instituted, it will be for the state courts in the first instance to determine whether particular items of evidence may be admitted.

Brewer v. *Williams,* 430 U.S. 387, 407 n.12.

[3] Whenever a constitutional challenge is presented to the Iowa Supreme Court, the court reviews the evidence de novo. *Armento* v. *Baughman,* 290 N.W.2d 11, 15 (Iowa 1980); *Watts* v. *State,* 257 N.W.2d 70, 71 (Iowa 1977).

Petitioners makes three specific contentions in respect to the state courts' inevitable discovery ruling: (1) the inevitable discovery doctrine applied by them is constitutionally deficient; (2) the burden of proof applied by them is constitutionally inadequate; and (3) the finding that the body would have been discovered in any event is not supported by the record.

The Doctrine

The Iowa Supreme Court exhaustively treated the inevitable discovery doctrine issue. *Id.* at 255-62. The court noted that the constitutional propriety of the inevitable discovery doctrine exception to the exclusionary rule has not been considered by the United States Supreme Court. *Id.* at 256.[4] Noting the body of law from the lower federal courts and the courts of other states, *id.* at 256-58, the Iowa Supreme Court concluded that the doctrine was a "constitutionally sound exception to the rule of exclusion." *Id.* at 260. The inevitable discovery doctrine has not met with unanimous approval from the courts and commentators, *id.* at 257-58, although the body of law supporting the doctrine continues to develop.[5]

It is this court's conclusion that the two-part test applied by the Iowa Supreme Court is not constitutionally deficient. The test requires the prosecution to show that (1) the police did not act in bad faith for the purpose of hastening discovery of the evidence in question, and (2) that the evidence would have been discovered by lawful means. *Id.* at 260. The second prong of the test requires proof of how the evidence would have been

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[4] But see footnote 2, *supra*.

[5] Recent federal cases applying the doctrine include *United States* v. *Hubert*, 637 F.2d 630 (9th Cir. 1980); *United States* v. *Kandick*, 633 F.2d 1334 (9th Cir. 1980); *United States* v. *Bienvenue*, 632 F.2d 910 (1st Cir. 1980); *United States* v. *Brookins*, 614 F.2d 1037 (5th Cir. 1980) (limited rule).

discovered. *Id.* at 258. The Iowa Supreme Court stressed that a "showing that discovery *might* have occurred is entirely inadequate" and that a "determination that a discovery would have come about must rest upon the record." *Id.* at 260.

Petitioner relies heavily on *Wong Sun* v. *United States,* 371 U.S. 471 (1963), as support for his contention that the Iowa courts committed constitutional error. The decision in *Wong Sun* rested on a finding that the challenged evidence would not have been found except for the constitutional violation. *Id.* at 487-88. Thus, *Wong Sun* does not foreclose the inevitable discovery doctrine as a constitutionally permissible exception to the exclusionary rule.

Petitioner also relies on *Brown* v. *Illinois,* 422 U.S. 590 (1975), and *United States* v. *Wade,* 388 U.S. 218 (1967). *Brown* dealt with the attenuation exception to the exclusionary rule which is analytically different from the inevitable discovery doctrine, and therefore is inapposite. *Wade* dealt with in-court identifications of the defendant by witnesses who had previously identified him at a lineup conducted without the presence of his counsel. The Supreme Court declined to bar any possible in-court identification by the witnesses who had participated in the lineup. Rather, the Court ruled that the government should first be afforded the opportunity to establish that the identifications "were based upon observations of the suspect other than the lineup identification." *United States* v. *Wade, supra,* 388 U.S. at 240. Thus *Wade* dealt with the independent origin exception to the exclusionary rule which is somewhat similar to the inevitable discovery rule. The articulated rule was necessary so as to not "render the right to counsel an empty one," *id.* by crystallizing the witnesses' identification and effectively foreclosing any defense based upon mis-identification. The inevitable discovery doctrine applied by the Iowa Supreme Court did not empty petitioner's right to counsel of its protection because the state had the burden of proving that the body would have been found anyway, and defendant's counsel could cross-examine the state's witnesses and present evidence on behalf of defendant at the suppression hearing.

As the multitude of cases dealing with the exclusionary rule make clear, the purpose of the rule is to deter conduct in contravention of constitutional rights. *See Brown* v. *Illinois, supra,* 422 U.S. at 599-600. The inevitable discovery doctrine articulated and applied by the Iowa Supreme Court does not frustrate the exclusionary rule's deterrence purpose because the test requires an absence of bad faith on the part of the police and proof that the police would have discovered the evidence in any event.

The Burden of Proof Standard

The burden of proof standard applied by the Iowa courts was preponderance of the evidence. *State* v. *Williams, supra,* 285 N.W.2d at 260. Petitioner, relying on *United States* v. *Wade, supra,* asserts that the Constitution demands a clear and convincing standard. In *Wade* the Court stated that it would not require exclusion of courtroom identifications of the defendant, where pretrial lineups were conducted in the absence of the defendant's counsel, "without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification." *United States* v. *Wade, supra,* 388 U.S. at 240.

The Iowa Supreme Court relied in part upon the plurality decision in *Lego* v. *Twomey,* 404 U.S. 477, 489 (1972) (voluntariness of confession hearing) and the majority opinion in *United States* v. *Matlock,* 415 U.S. 164, 177-78 n.14 (1974) (generalized statement regarding burden of proof at suppression hearings).

Petitioner argues that the Sixth Amendment right to counsel requires a higher burden of proof than that applied at suppression hearings arising out of alleged Fourth Amendment violations. The basis of this argument is that the exclusionary rule invoked in Fourth Amendment cases is a judicially created remedy to enforce that constitutional right whereas the Sixth

Amendment exclusionary rule is an essential element of the constitutional right. Such is also true of the Fifth Amendment right of a criminal defendant to not be compelled to testify against himself. "In that sense, the exclusion of involuntary confessions derives from the [Fifth] Amendment itself. *United States* v. *Janis*, 428 U.S. 433, 443 (1976)." *United States* v. *Raddatz*, 447 U.S. 667, 678 n.4 (1980). *Lego* upheld the preponderance of the evidence standard at suppression hearings to determine the voluntariness of confessions.

The Iowa Supreme Court was correct in applying the preponderance of the evidence standard rather than requiring proof by clear and convincing evidence. *Cf. United States* v. *Morrison*, 449 U.S. 361 (1981) (Sixth Amendment rights protected by remedies similar to remedies invoked for violation of other constitutional rights).

Evidence to Support Finding

Petitioner argues that the evidence introduced at the suppression hearing was not sufficient to support the state's burden of proof. The evidence before the state courts is well summarized in *State* v. *Williams, supra*, 285 N.W.2d at 260-62, and need not be reiterated here.

The Iowa Supreme Court's finding is a factual finding which this court may review only within the limits of 28 U.S.C. § 2254(d). *See Sumner* v. *Mata*, 101 S.Ct. 764, 769 (1981) (discussing *Taylor* v. *Lombard*, 606 F.2d 371, 375 (2d Cir. 1979), *cert. denied*, 445 U.S. 946 (1980)). Under section 2254(d), the court's finding is presumed to be correct—indeed, this presumption of correctness is mandated by the statute. *See Sumner* v. *Mata, supra*, 101 S. Ct. at 769. Only if one of the exceptions enumerated in section 2254(d) is established is this presumption overcome.

A review of the evidence before the state courts leads this court to conclude that the evidence was sufficient to permit the

finding that the state had proved by a preponderance of the evidence that the body would have been discovered by the searchers in any event. Nothing in the state court record establishes any of the exceptions enumerated in section 2254(d).

However, petitioner contends that additional evidence relating to the body and the search introduced in this court at the habeas corpus hearing, referred to in petitioner's post-hearing memorandum and referred to hereinafter as newly discovered evidence, establishes that the material facts were not adequately developed at the suppression hearing and that the suppression hearing was not full, fair and adequate. 28 U.S.C. § 2254(d), exceptions 3 and 6. Petitioner further contends that the whole evidentiary record, as expanded by the newly discovered evidence, cannot support a finding of inevitable discovery of the body.

Perhaps the newly discovered evidence should not even be considered in this habeas corpus proceeding for lack of exhaustion of state remedies. Petitioner has not sought state post-conviction relief on the grounds of newly discovered evidence under Iowa Code Chapter 663A. However, the exhaustion doctrine, codified in 28 U.S.C. § 2254(b) and (c), is based on principles of comity rather than jurisdiction. *Cage* v. *Auger*, 514 F.2d 1231, 1232-33 (8th Cir. 1975). Under all the circumstances it would appear to be unnecessarily burdensome on the parties and the state and federal courts to require this inevitable discovery issue to be relitigated in the Iowa courts and then relitigated in the federal courts. The newly discovered evidence will be considered in this proceeding. *See Austin* v. *Swenson*, 522 F.2d 168, 170 (8th Cir. 1975); *Losieau* v. *Sigler*, 421 F.2d 825, 828 (8th Cir. 1970).

I doubt that the newly discovered evidence[4] is of sufficient

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[4] **The newly discovered evidence consists of previously overlooked photographs of the body at the site of its discovery and recent deposition testimony of the investigative officer in charge of the search. This newly discovered evidence neither adds much to nor subtracts much from the suppression hearing evidence.**

import to demonstrate that the material facts were not adequately developed in the suppression hearing or that petitioner did not receive a full, fair and adequate suppression hearing. However, that question need not be decided because it is this court's independent finding and conclusion, based on a preponderance of all the evidence including the newly discovered evidence, that Pamela Powers' body would soon have been found by the searchers in essentially the same condition it was in at the time of the actual discovery, even if petitioner had not made any statements and had not led the police to the body. The body was right next to the end of a culvert located beneath a road. Much of the body was covered with snow, but her face and part of her brightly colored stripped shirt were not touched by snow and were completely exposed to the view of any person looking at the end of the culvert. The searchers were going into the ditches to look into all culverts, and they would have searched along the road where the culvert and body were located.

The state has fulfilled it burden of proving inevitable discovery of the body.

DENIAL OF REQUEST FOR OUT-OF-STATE COUNSEL

Petitioner alleges that Judge Denato's denial of his application for appointment of a California lawyer denied him his right to counsel under the Sixth and Fourteenth Amendments, and due process of law and equal protection of the law under the Fourteenth Amendment. In his application for appointment of counsel, petitioner requested that a California lawyer who is licensed to practice in California and Michigan, but not in Iowa, and an Iowa lawyer be appointed to represent him. The requested Iowa lawyer and two other Iowa lawyers were appointed to represent petitioner, but the California lawyer was not appointed.

Petitioner concedes that the right to counsel protected by the Sixth Amendment does not include an absolute right to choose appointed counsel. He argues, however, that because an indigent defendant has the right to demand appointed counsel, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and also has the right to choose to represent himself, *Faretta* v. *California*, 422 U.S. 806 (1975), he therefore has the right to have a specific attorney (here, the California attorney) appointed to represent him absent a substantial countervailing state interest. Petitioner has supplied no authority directly in support of his proposition and the court has found none.

There is no merit in plaintiff's position. This court fully concurs in the thorough and sound disposition of this issue made by the Iowa Supreme Court. *State* v. *Williams, supra*, 285 N.W.2d at 253-55. Petitioner was constitutionally entitled to the assistance of effective counsel, and he got that. But he had no constitutional right, absolute or qualified, to appointment of an out-of-state lawyer of his own choosing.

DENIAL OF REQUEST FOR OPINION POLL

On petitioner's motion, the trial was transferred from Polk County to Linn County, a county selected by petitioner and his counsel.

Petitioner argues that he was denied effective assistance of counsel, due process and equal protection of the law because Judge Denato denied his request for funds to conduct public opinion polls in five Iowa counties other than Polk County for the purpose of selecting a transferee county.

These constitutional claims are without merit. They were adequately disposed of by the Iowa Supreme Court, *id.* at 266, and need not be further discussed.

DENIAL OF JUROR CHALLENGE

Petitioner contends that he was denied due process when the trial court denied his challenge for cause of a prospective juror. The prospective juror was eventually removed by petitioner using one of his peremptory challenges. *Id.* at 267. The Iowa Supreme Court held that the denial was not subject to review on appeal because the challenge was not sufficiently specific as required by state law, but went on to express doubt that the contention had merit. *Id.*

A preliminary issue raised by respondent is the applicablity of *Wainwright* v. *Sykes,* 433 U.S. 72 (1977), which holds that failure to comply with a state's contemporaneous objection rule, absent cause and actual prejudice, precludes habeas corpus review of matters to which objection was not lodged. *Id.* at 87; *Parton* v. *Wyrick,* 614 F.2d 154, 157 (8th Cir.), *cert. denied,* 449 U.S. 846 (1980). *Wainwright* may not control because an objection, albeit an inadequate one, was made. In any event, the issue will be disposed of on its merits.

A review of the voir dire examination of the prospective juror leads to the conclusion that petitioner is not entitled to relief. The transcript does not reveal any abuse of the discretion placed in the hands of Iowa trial court judges to rule on challenges for cause. *See State* v. *Winfrey,* 221 N.W.2d 269, 273 (Iowa 1974). The denial of the challenge did not violate petitioner's right to due process of law.

SUFFICIENCY OF EVIDENCE—JACKSON v. VIRGINIA

Petitioner's next due process ground for relief is his claim that the trial court erroneously denied his motion for a directed verdict on the charge of premeditated first degree murder. In a strict sense petitioner's asserted ground for relief goes only to the sufficiency of the evidence to submit the charge to the jury. *Jackson* v. *Virginia,* 443 U.S. 307 (1979), involved the separate

question of whether the evidence was sufficient to uphold a finding of guilty that had been made. However, the standard announced in *Jackson* v. *Virginia* is the logical one to apply.

Habeas corpus relief must issue if "it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson* v. *Virginia, supra,* 443 U.S. at 324. The review of the record is made in "the light most favorable to the prosecution." *Id.*

Applying the standard of *Jackson* v. *Virginia, supra,* the evidence was sufficient for a rational trier of fact to find proof of the elements of deliberation and premeditation beyond a reasonable doubt. *See State* v. *Williams, supra,* 285 N.W.2d at 267-68.

INDICTMENT—SUBMISSION VARIANCE

Petitioner asserts as due process grounds for relief an alleged variance between the grand jury indictment and one of the theories of guilt submitted to the jury. The indictment accused him "of the crime of murder as defined in Sections 690.1 and 690.2 of the 1966 Code of Iowa [in] that [defendant] . . . did with malice aforethought, premeditation, deliberation and intent to kill, murder Pamela Powers in Polk County, Iowa." Instruction No. 8 submitted to the jury as an alternative to premeditated murder a felony murder theory—that petitioner murdered Pamela Powers in the perpetration of an attempted rape.[7] The gist of petitioner's argument is that submission of Instruction No. 8 to the jury violated his due process right to be tried only on the offense charged in the indictment.

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[7] The 1966 Iowa Code § 690.2 provided:

> All murder which is perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem, or burglary, is murder in the first degree * * *.

Iowa case law provides that when the state chooses to specify the manner in which a crime was committed, a defendant cannot "properly be convicted upon a finding it was committed by means not alleged." *State* v. *Hockmuth*, 127 N.W.2d 658, 659 (Iowa 1964). *See also State* v. *Allen*, 293 N.W.2d 16, 22 (Iowa 1980); *State* v. *Black*, 282 N.W.2d 733, 734 (Iowa 1979); *State* v. *Bakker*, 262 N.W.2d 538, 542 (Iowa 1978). Petitioner's counsel, however, did not challenge the jury instruction on the grounds of variance. The challenge could have been raised in a motion for a new trial unless it had been expressly waived. *State* v. *Williams, supra*, 285 N.W.2d at 268. The Iowa Supreme Court held that the claimed error in the jury instruction was expressly waived by petitioner's counsel. *Id.* at 268-69. Respondent argues that petitioner is not entitled to have this court review the merits of the claim unless cause and prejudice have been established. *Wainwright* v. *Sykes, supra; Francis* v. *Henderson*, 425 U.S. 536 (1976).

In *Collins* v. *Auger*, 577 F.2d 1107 (8th Cir. 1978), the United States Court of Appeals for the Eighth Circuit seemingly approved the following definition of cause: "[L]ack of knowledge of the facts or law would be sufficient cause for failure to make the proper objection * * *." *Id.* at 1110 n.2. Two of petitioner's trial counsel have submitted affidavits to show that under the *Collins* standard there is cause, based on their lack of knowledge of the law, for failing to object to the jury instruction. The two affidavits may be sufficient to establish cause for failing to object. In addition, trial counsel state in their affidavits that they did not consider or discuss the possibility of a Fourteenth Amendment due process objection. On the basis of *Collins*, petitioner has shown cause for failure to object to Instruction No. 8 on the grounds of variance.

The prejudice prong of *Wainwright* v. *Sykes* inheres in the merits of petitioner's contention. The court will dispose of the issue on the merits.

Initially it should be noted that petitioner has not shown that the felony murder theory or the evidence in support of it prejudiced his defense or came as a surprise. *Ridgeway* v. *Hutto*, 474 F.2d 22 (8th Cir. 1973)(challenge to variance on Sixth Amendment grounds). Indeed, although neither party brought it to my attention, the state court record before this court discloses that the felony murder theory was also submitted to the jury in petitioner's first trial in 1969. (Instruction No. 6 of Statement and Instructions filed May 6, 1969.) Thus, petitioner and his counsel were fully aware that the theory would no doubt be submitted again in the retrial.

It should also be noted that the Iowa case law, cited *supra*, to the effect that a defendant cannot be properly convicted upon a finding that he committed the crime by means other than the means specifically alleged, is not placed on constitutional grounds.

The essence of petitioner's claim is that he was tried and convicted of a charge of which he was not indicted. Cases dealing with the Fifth Amendment guarantee against being held to answer for a federal felony "unless on a presentment or indictment of a Grand Jury" are inapposite because that constitutional provision does not apply to the states through the Fourteenth Amendment. *Hurtado* v. *California*, 110 U.S. 516 (1884). Cases holding that a conviction for violating a code section not charged in the indictment violates due process are also inapposite because the indictment charged a violation of "Code sections 690.1 and 690.2," and murder committed in the attempt to perpetrate a rape is included in section 690.2. *See* footnote 7, *supra*. Furthermore, the minutes of grand jury evidence attached to the indictment, particularly the minutes of Dr. Leo

Luka's testimony, showed that the state would produce evidence supporting the felony murder theory. The fact that the felony murder theory was tried and submitted at the first trial has been previously noted.

In *Watson* v. *Jago,* 558 F.2d 330 (6th Cir. 1977), the court held that where a criminal defendant was forced to defend against felony-murder although charged only with deliberate and premeditated first degree murder, the resulting conviction was a denial of due process under the Fourteenth Amendment. However, in that case Ohio law made it clear that premeditated murder and felony-murder were two separate offenses. *Id.* at 334-35. Under Iowa law there is but one offense of murder. *State* v. *Conner,* 241 N.W.2d 447, 460 (Iowa 1976). Thus, petitioner was not tried and convicted of a crime for which he was not indicted. *Cf. Conner* v. *Auger,* 595 F.2d 407, 410-11 (8th Cir. 1979).

Submission of the felony murder theory did not deprive petitioner of due process of law. Felony murder was within the indictment and petitioner and his counsel had full and fair notice of the charges against him and of the fact that the felony murder theory would be submitted.[1]

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[1] The Iowa Supreme Court's decision affirming petitioner's first conviction and the subsequent federal habeas corpus decisions disclose that petitioner did not then complain about submission at the first trial of the felony murder theory. Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts requires that a petition "shall specify all the grounds for relief which are available to the petitioner and of which he has * * * knowledge." Althought the quoted rule may not apply because the first conviction was set aside on other grounds and it is a new conviction that is now under review, it is my opinion that petitioner's failure to assert this ground in his first habeas corpus proceeding ought to bar him from now doing so. Had he asserted the ground after the first conviction, the issue might have then been resolved by the reviewing courts for the guidance of the parties and the trial court in the second trial. Piecemeal post-conviction litigation is a plague on our system of criminal justice.

POSSIBLE LACK OF UNANIMITY ON THEORY

Petitioner's final contention is that the court's instructions permitted the jury to return a verdict of guilty without reaching a unanimous conclusion that petitioner committed either premeditated murder or felony murder. This contention was also not made to the trial court and the Iowa Supreme Court held that the issue could not be asserted for the first time on appeal. *State* v. *Williams, supra,* 285 N.W.2d at 269. Respondent argues that the procedureal waiver imposed by the Iowa Supreme Court precludes petitioner from raising the issue here. *Wainwright* v. *Sykes, supra.*

Under *Collins* v. *Auger, supra,* petitioner has established cause for failure to raise the issue before the trial court. Whether prejudice has been established need not be decided because that determination is entwined with the merits of petitioner's claim. If Instruction No. 8 permitted a non-unanimous decision by the jury and unanimity was required by due process, then prejudice would necessarily follow. The merits will be reached.

The essence of petitioner's argument is that he was entitled to have the jurors instructed that they must, before finding defendant guilty, unanimously agree on the means of the murder—either (1) with premeditation, deliberation and with a specific intent to kill or (2) in attempting to perpetrate a rape. No such instruction was requested by petitioner or his counsel.

Cases dealing with the requirement of unanimity urged by petitioner are few. Generally, " 'it is assumed that a general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict.' " *United States* v. *Murray,* 618 F.2d 892, 898 (2d Cir. 1980), *quoting from United States* v. *Natelli,* 527 F.2d 311, 325 (2d Cir. 1975), *cert. denied,* 425 U.S. 934 (1976). *See also United*

States v. *Pavloski*, 574 F.2d 933, 936 (7th Cir. 1978). Such a general instruction was given at petitioner's trial. There was no instruction given at petitioner's trial that expressly permitted a verdict based on different findings by individual jurors, as was the case in *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977).

Based on the foregoing as well as on reasons articulated by the Iowa Supreme Court in its reflections on the same claim, *State* v. *Williams, supra*, 285 N.W.2d at 269-70, it is this court's conclusion that no consitutional error appears.[9]

ORDER DENYING WRIT

Petitioner has failed to demonstrate that his conviction is tainted by any violation of his federal constitutional rights. Accordingly, his petition for a writ of habeas corpus is denied.

DATED this 18th day of December, 1981.

/s/ HAROLD D. VIETOR
United States District Judge

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[9] The unanimity instruction that petitioner claims should have been given to the jury was not given in the first trial either. He did not raise the issue in the appeal or in the habeas corpus proceedings challenging his first conviction. Therefore, the comments in footnote 8, *supra*, are equally applicable to this issue.